STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Extension Pipeline Company, L.L.C

:

Application pursuant to Sections 8 503, : 8-509 and 15-401 of the Public Utilities : Act - the Common Carrier by Pipeline :

07-0446

Law to Construct and Operate a : Petroleum Pipeline and when : necessary, to Take Private Property as : Provided by the Law of Eminent : Domain. :

PROPOSED ORDER ON REOPENING

DATED: November 21, 2014

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By the Commission:

I. BACKGROUND

On July 8, 2009, the Illinois Commerce Commission ("Commission") entered an Order in Docket No. 07-0446. ("2009 Order") The Commission therein ordered that Enbridge Pipelines (Illinois) L.L.C. (n/k/a Illinois Extension Pipeline Company, L.L.C. and referred to as "Applicant," "IEPC" or "Enbridge") is "granted a Certificate in Good Standing pursuant to Section 15-401 of the Common Carrier By Pipeline Law to operate as a common carrier by pipeline and that said Certificate in Good Standing shall be the following:"

IT IS HEREBY CERTIFIED, subject to the conditions imposed in this order, that Enbridge Pipelines (Illinois) L.L.C. is authorized, pursuant to Section 15-401 of the Common Carrier By Pipeline Law, to construct, operate and maintain the proposed 36-inch pipeline as described in this order and to operate as a common carrier by pipeline within an area sixty feet wide and extending approximately 170 miles along the route identified in Attachments A and B to the petition in Docket No. 07-0446.

It is noted that the Common Carrier by Pipeline Law, 220 ILCS 5/15-401(a) ("CCPL"), is part of the Public Utilities Act, 220 ILCS 5/1-101, et seq. ("PUA" or "Act").

The approved route extends from an Enbridge terminal at Flanagan in Livingston County, Illinois to a point of termination at a pipeline hub near Patoka, Illinois in Marion County.

The Commission further ordered that "the proposed pipeline is necessary and should be constructed, to promote the security or convenience of the public, pursuant to Section 8-503 of the Public Utilities Act."

The Commission further ordered that "Petitioner's request under Section 8-509 of the PUA for authorization "to take or damage private property in the manner provided for by the law of eminent domain" is not granted in this docket."

The Order in Docket No. 07-0446 was appealed to the Illinois Appellate Court by some of the Intervenors in the case. The Order was upheld on appeal. *Pliura Intervenors v. Illinois Commerce Commission*, 405 Ill. App. 3d 199 (2010).

In Docket No. 13-0446, an Order was entered April 29, 2014 pursuant to Section 8-509 of the PUA. It authorized Enbridge Pipelines (Illinois) L.L.C., "pursuant to Section 8-509 of the Act, to seek, in accordance with the Eminent Domain Act, easement rights along the pipeline that was certificated in Docket No. 07-0446 with respect to those parcels listed in Attachment A to the petition that [had] not yet been acquired." "Pliura Intervenors" filed an application for rehearing which was denied. Notice of appeal of the Order in Docket No. 13-0446 was filed on behalf of "Pliura Intervenors" and the matter is currently on appeal.

II. MOTION TO REOPEN AND AMEND ORDER

On May 19, 2014, Applicant filed, pursuant to Section 10-113(a) of the Act, a "Motion to Reopen and Amend Order Concerning Diameter of the Southern Access Extension ['SAX'] Pipeline." ("Motion to Reopen") Enbridge requests that the Certificate granted in the Order entered July 8, 2009 be amended to authorize a pipeline of "24 inches" rather than a "36-inch pipeline." Enbridge does not seek any change in the pipeline route or of right-of-way width.

In its Motion to Reopen and Amend Order, Enbridge stated that "the Southern Access Extension Pipeline" ("SAX" pipeline) was conceived to utilize a 36-inch pipe to move mainly so-called "heavy" crude per anticipated supply patterns (Motion to Reopen at 2); that shipper interest in moving heavy crude to the Patoka Hub, manifested in 2006-2007, thereafter became uncertain due to economic conditions; and that Patoka became significant to shippers of light oil sought by refineries capable of processing it. (*Id.* at 5)

Applicant further asserted that Marathon Petroleum Company L.P. ("Marathon"), "which operates three PADD II refineries, including one in Robinson, Illinois, that are reachable via the Patoka Hub," has now committed to have Enbridge move light crude to Patoka via the SAX pipeline in order to supply these refineries; that Marathon has contracted for enough of the line's initial capacity to warrant construction of the line; that other shipper interest in moving light oil to Patoka also has been made known to Enbridge; and that in addition, there continues to be the potential to move some volume of heavy crude to Patoka for further transport. (*Id.*)

Applicant also stated that "in the circumstances, and as part of the Light Oil Market Access Program, Enbridge Illinois has determined that the appropriate initial capacity of the SAX pipe line is now 300,000 bpd, a volume that can be readily accommodated by a 24-inch outside diameter pipeline." (*Id.* at 5-6)

Applicant also requested that the Motion to Reopen and Amend Order be decided without a hearing.

The Motion to Reopen and Amend Certificate was opposed by "Pliura Intervenors."

On June 26, 2014, the Commission reopened the proceeding "pursuant to Section 10-113(a) of the Public Utilities Act and 83 III. Adm. Code 200.900, for the limited purpose of allowing Parties to address whether the Order should be amended in the manner described in the Motion to Reopen and Amend Order...," as stated in a corrected notice of Commission action issued June 27, 2014. It is noted that 83 III. Adm. Code 200.900 is titled, "Reopening on Motion of the Commission." It provides in part that after issuance of an order by the Commission, the Commission may, on its own motion, reopen any proceeding..." (emphasis added)

As noted above, Applicant requested that the Motion to Reopen and Amend Order be decided without a hearing. That request was not granted. Pursuant to due notice, the matter was set for a prehearing conference, and subsequently was set for an evidentiary hearing, at the Commission's offices at Springfield, Illinois before a duly authorized Administrative Law Judge. Appearances were entered by respective counsel for Applicant, "Pliura Intervenors," "Turner Intervenors," the County of McLean and the Commission Staff ("Staff" or "ICC Staff").

Evidence presented by Applicant consists of the content, other than legal opinions, of its Motion to Reopen and Amend Order (IEPC Ex. 1) and its Reply on Motion to Reopen and Amend Order (IEPC Ex. 2). The Applicant's sponsoring witness was cross-examined at the hearing by attorneys for Pliura Intervenors and Turner Intervenors. Staff filed and presented the testimony and exhibits of Mark Maple, who was cross-examined by Pliura Intervenors and Turner Intervenors.

Pliura Intervenors filed and presented the testimony and exhibits of Carlisle Kelly, and Turner Intervenors filed and presented the testimony and exhibits of Timothy Kraft. Except for one item, the Kelly and Kraft testimony and exhibits were admitted over the objections raised in motions to strike filed by Applicant.

Hearings were concluded on October 2, 2014. Initial briefs ("IBs) and reply briefs ("RBs") were filed by Applicant, Pliura Intervenors, Turner Intervenors and the Commission Staff. Draft orders were filed by Applicant, Pliura Intervenors and Turner Intervenors. It is observed that purpose of draft orders is not to provide parties with an

opportunity to raise new arguments or proposals that they chose to leave out of their post-hearing briefs.

A Proposed Order was issued by the Administrative Law Judge.

III. STATUTORY AUTHORITY AND COMMISSION RULES

Section 15-401 of the PUA provides, in part:

(b) Requirements for issuance. The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed; a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate. ...

Section 10-113 of the PUA provides in part, "(a) Anything in this Act to the contrary notwithstanding, the Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it. ..."

Section 200.900 of the Commission's Rules of Practice, 83 III. Adm. Code 200.900, "Reopening on Motion of the Commission," provides, in part, "After issuance of an order by the Commission, the Commission may, on its own motion, reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening. ..."

Other sections of the Illinois Compiled Statutes and Commission rules were cited by Parties as indicated below.

IV. APPLICANT'S POSITION

The first section of Applicant's initial brief is titled, "Background." (App. IB at 1-3)

A. Argument

The second section of Applicant's initial brief is titled, "Argument." (App. IB at 3-11)

Purpose and Scope

The Commission reopened Docket No. 07-0446 on June 26, 2014. Applicant argues that the Commission made clear in its corrected notice issued June 27, 2014, that the reopened proceedings were to be limited in focus and scope. (App. IB at 3, citing also Tr. 1281-1282) According to Applicant, that limited purpose, as described in

its Motion to Reopen and Amend, did not include a reexamination of whether the SAX pipeline should be certificated. (App. IB at 3)

Applicant also cites testimony of Staff witness Mark Maple, "I don't believe that the amending of a certificate is the same as having to meet the four criteria of a new certificate. To me, amending a certificate is merely fixing an error or changing – making a change to what has already been approved." (App. IB at 3, citing Tr. 1310, 1343)

Applicant asserts that the central facts supporting its request for an amendment to its CGS approving installation by Applicant of a SAX pipeline 24 inches in diameter are straightforward and essentially uncontested. Applicant states that the only change "of any significance" is the diameter of the pipeline -- from 36 inches to 24 inches; that the route is the same; that much of the oil will still come from Canada, a more secure and reliable source for imported oil; that the oil will still be accessible by Midwestern refineries; that except for its diameter, the pipe's manufacture, construction, operation, and maintenance will be the same as approved in the July 2009 Order. (*Id.* at 3-4)

Applicant also states that the policy, practice, and safety recommendations of the National Transportation Safety Board ("NTSB") based on its investigation of the Marshall, Michigan incident have already been required, in Docket No. 13-0446, to be implemented on the SAX pipeline as they have on other Enbridge pipelines; and that all IEPC-acquired permits, licenses, and agreements identified in the certification proceeding remain in effect and need no modification due to pipe size. (App. IB at 3-4, citing App. Reply on Motion to Reopen, identified as IEPC Ex. 2, at 3; Motion To Reopen, identified as IEPC Ex. 1, at 7, para. 8; and Tr. 1321-1322) Applicant also cites testimony by Staff witness Mr. Maple that "I don't believe there are actually that many differences between the two proposed pipelines." (*Id.* at 4, citing Tr. 1311)

Additional information was provided in the record regarding the manufacture and type of pipe to be used. (App. IB at 4, citing Motion to Reopen at 7)

Applicant argues that the proposed amendment to the Certificate will have no adverse effect on any landowner along the route. Applicant states that except for the diameter, the pipe's manufacture, construction, operation, and maintenance will be the same as approved in the July 2009 Order, although average operating pressure may be lower. Applicant asserts that depth of cover will not change; that use of a 24-inch pipe will not require any change in right-of-way easement agreements -- including landowner compensation levels agreed to -- existing easement rights, or patrol and maintenance practices approved in the July 2009 Order and in the eminent domain Order in Docket No. 13-0446; and that the right-of-way is impressed with easements that allow a pipeline of whatever size IEPC decides "up to" 36 inches in outside diameter or that specify no requirement about or limitation on pipe size. (App. IB at 5, citing Motion to Reopen at 6)

Applicant asserts that it is expected the SAX pipeline when completed will initially transport more light oil than heavy crude; that the types of petroleum expected to be

shipped -- both light oil and heavy crude -- are among the types of oil specifically identified in IEPC's Application in the initial Docket No. 07-0446 proceedings; and that the actual grades of crude transported at any given time will depend upon shipper nominations, capacity availability, and market needs. (App. IB at 5 and RB at 10-11, citing Motion to Reopen at 7; App. Reply on Motion to Reopen at 3)

Applicant submits that the initial capacity of the SAX pipeline is now 300,000 barrels per day ("bpd") instead of the originally proposed initial capacity of 400,000 bpd with a 36-inch pipe, a volume that can be "readily accommodated" by a 24-inch outside diameter pipeline. (App. IB at 5-6) Applicant states, "In total, IEPC has received contractual commitments for SAX from two individual shippers for 10- or 15-year terms for a volume of approximately 210,000 bpd of liquid petroleum that originates in western Canada or North Dakota. This leaves 90,000 bpd of the 300,000 bpd capacity available for other shippers." (*Id.*, citing Tr. 1227-1228; 1241-1242; 1272-1275; 1344) Applicant further asserts, "Thus, the 24-inch SAX pipeline will meet the shipping commitments of Marathon Petroleum Company L.P. ("Marathon") and the second shipper, and allow for additional light and heavy oil movements." (*Id.*, citing Motion to Reopen at 6)

With respect to the reasons for the change in the diameter of the pipe, and the resulting reduced initial capacity, Applicant states that it filed its Application for Certificate in Good Standing and Other Relief on August 16, 2007 ("Application"); and that after a lengthy hearing, its requests for certification and authority to construct, operate, and maintain the proposed line were granted by the Commission in July 2009. According to Applicant, by that time, the "Great Recession" had severely impacted the nation's economy, and concomitantly, the North American energy market and the derivative demand for transportation of crude oil by common-carrier-pipelines. (App. IB at 6, citing Motion to Reopen at 3; Tr. 1164-1165, 1217-1219)

Applicant states that in addition to the effects of the "Great Recession," which continued "well past 2009," appeals of the Commission's July 2009 Order and litigation regarding IEPC's right to exercise its existing, so-called "Luxor" easement rights were not completely resolved until well into 2011; and that it was not until early 2012 that such matters were resolved "and the economy had rebounded enough to strengthen energy demand as to warrant renewed attention to projects such as the SAX pipeline." (App. IB at 6, citing Motion to Reopen at 3)

Applicant asserts that by 2012, shipper interest in moving heavy crude to the Patoka Hub, manifested in 2007-2009, "had come to be focused on refineries," such as BP in Whiting, Indiana, that had reconfigured themselves to use more heavy crude by adding coker capacity; that conversely, Patoka had become significant to shippers of light oil sought by refineries capable of processing it; and that Marathon, which operates three PADD II refineries, including one in Robinson, Illinois, that are reachable via the Patoka Hub, has committed to have IEPC move light crude to Patoka via the SAX pipeline in order to supply these refineries. (App. IB at 7, citing Motion to Reopen at 5) Applicant asserts that a second shipper has also committed to have IEPC move light crude to Patoka via the SAX pipeline. (*Id.*, citing Tr. 1227-1228; 1233, 1344)

According to Applicant, the fact that the SAX pipeline is now expected initially to carry predominantly light oil from the United States and Canada does not represent a "fundamental change" in the project, and its Application did not limit the project to the carrying of "heavy" Canadian crude. (App. IB at 7) The first page of the Application stated that IEPC is seeking the "entry of an order authorizing it to construct, operate, and maintain approximately 170 miles of a new 36-inch liquid petroleum pipeline" (App. IB at 7, citing Application at 1) Applicant states that the term "liquid petroleum pipeline" is not synonymous with a "heavy" crude oil pipeline, and that in footnote 4 of the Application on page 12, it specifically represented that the SAX pipeline might carry "light, sweet crude" from the U.S. as well as Canada. (App. IB at 7-8; see also App. RB at 9-10)

Applicant asserts the light oil it seeks to carry under its Light Oil Market Access Program is from "U.S. north central producing formations – e.g., the Bakken – as well as Western Canadian sources, such as the Cardium and Viking formations in Alberta." (App. IB at 8 and RB at 10, citing Motion to Reopen at 4)

Applicant cites testimony from Staff witness Maple that "the pipeline ... as it was ordered, originally didn't specify a weight of the oil. It was just a petroleum pipeline. So that project has not changed." (App. IB at 8 and RB at 10, citing Tr. 1351-1352) Applicant states that Mr. Maple also testified that the fact the volume of oil to be shipped at least initially may be closer to 200,000 bpd does not change his opinion that the pipeline is "still a benefit to the public;" and that another reason why the SAX pipeline is still a benefit to the public is that it continues to provide benefits identified in Mr. Maple's 2007 testimony, including "a redundancy of pipeline network" and the ability to "bring in more sources of oil from friendly countries, be it Canada or the United States." (App. IB at 8 and RB at 13, citing Tr. 1350-1351)

Commission Authority

Applicant argues that the Commission has authority to grant the relief requested, and that the Commission's authority to amend its own final orders is well established. Section 220 ILCS 5/10-113(c) of the PUA provides: "[T]he Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, or decision made by it." (App. IB at 8, citing App. Reply on Motion to Reopen at 13)

Applicant asserts that on multiple occasions, the Commission has granted an applicant's motion to amend a final order in response to market conditions or other unforeseen circumstances pursuant to this section of the PUA. Applicant states that, Enbridge Energy Partners, L.P. ("EEP") and Enbridge Energy, Limited Partnership ("EELP") sought and obtained an amendment to their Line 61 certification order authorizing the construction of three additional pumping stations, and that the Commission found the amendment would be appropriate due to increased volumes of North America-crude demanded by refineries nationwide: "To meet such public needs,

ever-greater volumes of crude are being presented for movement . . . which means the capacity of Line 61 must be enhanced." (App. IB at 8-9, citing Order on Reopening, Docket No. 06-0470, August 6, 2013, at 3)

Applicant submits that in *Ameropan Oil Corporation v. Illinois Commerce Commission*, 298 III. App. 3d 341 (1st Dist. 1998), the Appellate Court approved the Commission's decision to grant Commonwealth Edison Company's ("ComEd") petition to amend its Certificate of Public Convenience and Necessity to relocate a part of a major transmission line in response to conflicting plans made by the Illinois Department of Transportation. Applicant states, "The Commission "found in pertinent part that the line was necessary to supply power to the central business district of Chicago and that ComEd's plan would assure continued adequate, reliable and efficient service to that area. It also found that the proposed relocation route was the least-cost feasible means of restoring service to the line.' *Id.* at 345." (App. IB at 9)

Applicant also states that in *Wolverine Pipe Line Company*, Docket No. 58727, 1975 WL 351376 (Supplemental Order dated April 16, 1975), the Commission granted Wolverine's supplemental petition to amend its Certificate of Public Convenience and Necessity and re-route its pipeline in response to difficulties with right-of-way acquisitions and increased development in the area. (App. IB at 9-10)

B. Response to Intervenors

Timing

Section I of the "Argument" in Applicant's reply brief is titled, "Allegation that IEPC deliberately hid that it intended to build a 24-inch pipeline instead of a 36-inch pipeline." (App. RB at 4-7)

According to Applicant, the record shows that from the time IEPC reenergized the SAX project late in 2012, it made clear in public statements that it was considering installing a 24-inch diameter pipeline instead of a 36-inch diameter pipeline. (*Id.* at 5-6, citing App. Reply on Motion to Reopen at 9-12)

Applicant claims the record is also clear that IEPC did not make the final decision to install a 24-inch diameter SAX pipeline until March 11, 2014, when IEPC issued its first purchase order for 24-inch diameter pipe; and that until that time, events, such as an increase in shipper interest and volumes, might have caused IEPC to use a pipe greater than 24-inches in outside diameter. (App. RB at 6, citing Monthei, Tr. 1154-1155) Applicant states that Mr. Monthei, testifying for IEPC, was clear that IEPC's business people want to assess market conditions "right up until they're not able to do it," and then "based on that assessment and understanding of market conditions, they're either going to propose to design this pipeline for increased values based upon ... most current market conditions and market trends or they're going to propose less, smaller values if that's what the market trends demand." (App. RB at 6, citing Tr. 1254) He further testified that "IEPC was looking at different sizes for the pipeline up until we

ordered the pipeline" and "[w]e actually thought it was going to be 30-inches right up until we made the pipe order." (*Id.*, citing Tr. 1255)

Applicant states that more evidence that IEPC had not firmly decided on a 24-inch diameter pipeline as soon as suggested by Intervenors is set forth in the FERC's Order on Petition for Declaratory Order, Docket No. OR13-19-000, issued July 31, 2013. ("FERC Order") The Pliura Intervenors argue that in the FERC Order, "it was pointed out by FERC that Enbridge had long been planning a 24" pipeline." (Pliura IB at 8) Applicant responds that "in that same Order, FERC expressly noted that 'Enbridge Illinois states that it may increase the size of the pipeline to 30 or 36 inches." (App. RB at 6, citing FERC Order at 1)

According to Applicant, "The record is equally clear that the reason why IEPC did not file to reopen and amend the certificate granted in Docket No. 07-0446 before it did on May 19, 2014, had to do with its belief that it had inherent authority to make that change without going back to the Commission." Applicant states, "That belief was based on facts such as that IEPC had publicly revealed that it was considering installing a 24-inch diameter SAX line but that until April 2014, the Commission Staff never suggested that it was necessary to reopen Docket No. 07-0446 to amend the certificate." It was also IEPC's belief, based on "Commission orders sanctioning discretion in pipe sizing up to some maximum, that it had implicit authority under the certification order in Docket No. 07-0446 to install a smaller pipeline if business conditions and customer demand so warranted." (App. RB at 7, citing App. Reply on Motion to Reopen at 12)

Applicant contends, "The reality is that it was ICC Staff, based on a phone call and emails with IEPC in April and May of 2014, while Docket No. 07-0446, the certification docket, was closed, that convinced IEPC that it should seek to reopen Docket No. 07-0446 and amend its certificate." (App. RB at 7)

"New Project" Allegations

Section II of Applicant's Argument in its reply brief is titled, "Allegation that the 24-inch diameter sax pipeline is a new project." (App. RB at 8-17)

Applicant argues that Intervenors' "position that the reopened Docket No. 07-0446 proceeding should entail a full-scale reexamination of whether the SAX pipeline should be certified was rejected by the Commission when it reopened the proceeding for the limited purpose of allowing parties to address whether the Order should be amended in the manner described in [Enbridge's Motion to Reopen and Amend]." (*Id.* at 9)

Applicant argues that Pliura Intervenors and Turner Intervenors also ignore that of necessity an oil pipeline must be prepared to move oil, of whatever form, to where it is needed; that the pipeline cannot be rigidly confined to carrying one type of oil because shipper needs, and the petroleum market, change; and that adapting to

shipper needs is part of the pipeline operator's obligations as a common carrier. (App. RB at 10-11)

Applicant next argues that the contention by Intervenors that the SAX pipeline's 36-inch diameter and associated 400,000 bpd capacity were critical to the Commission's and the Appellate Court's finding that the pipeline met the public convenience and necessity standard is incorrect. (App. RB at 11-17)

Applicant argues that all of the benefits identified by Staff and adopted by the Commission in the July 2009 Order as important in the public-need determination are met by the SAX pipeline project as currently proposed with a 24-inch diameter pipeline. (App. RB at 13) According to Applicant, the 24-inch diameter SAX pipeline will still bring Canadian petroleum, albeit more "light" oil petroleum, to Patoka; the light oil is still important to refineries in the Midwest; the SAX pipeline will still provide additional oil supplies from a friendly and reliable country, and increased production from U.S. sources; and the entire SAX pipeline will still provide an alternate supply of petroleum when other sources are not available. (*Id.*)

Applicant asserts that Pliura Intervenors make several incorrect statements that are directly contradicted by the record. For example, the Pliura Intervenors allege that "[t]he plan is no longer to carry Canadian crude, but is instead proposing to carry Light Crude from areas other than Canada." (App. RB at 13-14, citing Pliura IB at 12) Applicant claims that statement "is incorrect in at least two respects: (1) the plan was never to carry only Canadian crude (see, e.g., Application at 12 n. 4; Motion to Reopen and Amend...at 4); and (2) the light oil that will be carried will be from Canada as well as the United States. *Id.*" (App. RB at 14) Applicant states that as another example, Pliura Intervenors suggest that all expert and non-expert witness testimony in Docket No. 07-0446 solely addressed the carrying of heavy crude from Canada. (*Id.*, citing Pliura IB at 10) Applicant argues, "That is also inaccurate. See, e.g., Reply Testimony of Dale W. Burgess, ... Enbridge Ex. 1A, Docket No. 07-0446, at 5 and 6 (referencing the U.S. Williston Basin as a source of crude to be carried by SAX); Appendix G (referencing Northern Rockies as a source of crude oil supplies for Illinois)." (App. RB at 14)

Applicant argues that in affirming the Commission's grant of a certificate in the Docket No. 07-0446 Order, the Appellate Court summarized the evidence presented regarding public convenience and necessity on which the Commission relied as "(1) the location of the pipeline extension, (2) the additional oil capacity that pipeline extension would transport, (3) the destination of the oil to a major hub within Illinois for further travel throughout the United States, (4) current market factors affecting the stability of alternate sources of oil, (5) projections of increased oil demands, (6) increased revenues for local economies, and (7) increased market competition resulting in lower prices for petroleum-based products." (App. RB at 15-16, citing *Pliura Intervenors v. Illinois Commerce Comm'n*, 405 Ill. App. 3d at 209)

According to Applicant, "On their face, only one of the seven factors identified by the Court has any possible connection to the capacity of the pipeline, and the Intervenors have provided no factual or logical basis for any assertion that the six other factors are any less valid today for the 24-inch diameter pipeline." (App. RB at 16)

Applicant also states that Pliura Intervenors have attempted in their Initial Brief to direct attention away from the actual bases of the Commission's findings and conclusions on public need by quoting almost exclusively from a section of the July 2009 Order in which the Commission is simply summarizing some of the evidence presented by IEPC. (App. RB at 16-17, citing Pliura IB at 5-7)

Private Line Issue

Section III of Applicant's Argument in its reply brief is addresses ".Allegations that SAX is a private line." (App RB at 17-29)

Applicant states that both Pliura and Turner Intervenors rely heavily on the theory that SAX is not a common carrier line, but instead a private line or contract line for the benefit of Marathon Petroleum Company ("Marathon"). (App. RB at 17)

Applicant submits that Intervenors' private line theory has two main parts: "The first is whether the alleged 35% ownership interest of Marathon in SAX, standing alone, somehow converts it into a private line. The second is whether the shipping commitment of Marathon and another shipper for 210,000 bpd out of the 300,000 bpd capacity of the 24-inch SAX pipeline somehow converts it into a private line." (*Id.* at 19)

Regarding the Marathon Investment, Applicant argues that the investment of Marathon in the SAX project does not render SAX a private line for the benefit of Marathon. (App. RB at 19)

Applicant asserts that effective July 1, 2014, "Enbridge Energy Company, Inc. (the parent company) and Marathon Petroleum Company reached an agreement whereby Marathon, through its affiliate Lincoln Pipeline LLC, agreed to purchase a 35% equity interest in the SAX project. The other member of the project is Enbridge Energy Company, Inc." (*Id.*)

Applicant states that Turner Intervenors argue that because Marathon has a 35% equity investment in SAX, the SAX pipeline is a private line. (App. RB at 20, citing Turner IB at 6, 16-17) According to Applicant, the private line arguments by Turner Intervenors based on the Marathon investment have no support in any federal or state law on what constitutes a common carrier and the Intervenors cite to no authority so holding. (App. RB at 20)

Applicant submits that Turner Intervenors first appear to argue that because of its 35% equity interest in SAX, Marathon can control whatever amount of capacity on the SAX pipeline it wants for its own benefit. Applicant argues, "There is no record support

for this argument, which also runs counter to how the business world works. A 35% equity share makes Marathon a minority, not a controlling, shareholder." (App. RB at 20)

Applicant next asserts that "Turner Intervenors' argument that because Marathon has invested in and acquired a [35%] stake in IEPC, the SAX line is a private or contract line is belied by Commission actions certificating common-carrier pipelines in which major petroleum companies have substantial interests." (App. RB at 20) Applicant states, "Recently, for example, the Commission granted a certificate in good standing and authorization to exercise eminent domain power in constructing a new pipeline (incidentally, an "extension" of an existing interstate pipeline) to Explorer Pipeline Company. ICC Dkt. No. 13-0433, Order, April 16, 2014 ('Explorer Order')." (App. RB at 20-21)

Applicant states that "the Commission found that Explorer Pipeline (EXPL) is owned by a 'consortium of different oil companies' including such majors as Chevron, Shell, ConocoPhillips, and Sunoco.... Some of those companies were described as holding substantial shares of the certificated entity: The evidence was that Shell holds 35.97% of EXPL and that Chevron hold 16.69%.... All together six of the seven owners of EXPL, which include a Marathon entity...own approximately 93% of the voting stock of EXPL." (App. RB at 21) Applicant states that several of those oil company owners also ship product on EXPL, and that the Commission found nothing adverse in the ownership structure of EXPL, including the 35%+ stake held by Shell; found EXPL to be 'fit, willing, and able' to provide common-carrier-by-pipeline services; and certificated it as a 'common-carrier-by-pipeline.' Explorer Order, at 30-31." (App. RB at 21)

Applicant next responds to a statement on pages 16-17 of Turner Intervenors initial brief that "[w]hen FERC made its SAX decision to allow guaranteed shipping priority to shippers making long-term written shipping commitments, FERC had no idea that 35% of the SAX would be completely private, and not engaged in common carriage."

Turner Intervenors' Applicant contends that argument reveals misunderstanding of FERC law. (App. RB at 21-22) Applicant states that all interstate oil pipelines are common carriers subject to FERC regulation under the Interstate Commerce Act ("ICA"), with one limited exception which applies where a pipeline originates at an oil producer's well and delivers crude oil to that producer's refinery; and that such a pipeline is the only "private" pipeline permitted under the ICA. (App. RB at According to Applicant, FERC has made clear that the fact that a pipeline transports an affiliate's oil is irrelevant to its status as a common carrier pipeline under the ICA; and that even if a pipeline transports only its affiliate's oil, it remains a common carrier subject to the ICA and is required to provide common carrier service to any third party shipper who requests it. (App. RB at 22, citations omitted) Applicant also argues, "Similarly, the fact that a pipeline may transport significant volumes of oil for 'committed shippers' pursuant to transportation service (or 'T&D') agreements is irrelevant to its common carrier status. FERC routinely approves oil pipeline common carrier rate

structures and terms and conditions of service where 90 percent of the pipeline's capacity is subject to 'committed shipper' volumes, with 10 percent set aside for 'uncommitted shipper' volumes." (App. RB. at 22, citations omitted)

Applicant responds to arguments by Pliura Intervenors that "the investment interest purchased by Marathon Petroleum Company with its decision to lock up 90% of the line made it effectively a private line" and that "Marathon Petroleum Company has committed to volumes that will consume nearly the entire capacity of the proposed pipeline." (Pliura IB at 13-14) According to Applicant, "Those claims are false. The record shows that the SAX pipeline has a capacity of 300,000 bpd, and that Marathon and another shipper have committed to a total of 210,000 bpd, leaving 90,000 bpd for other shippers." (App. RB at 2, citing Tr. 1314-1315, 1344-1347)

Under Section III.B of its Argument, "Private Line," Applicant states, "A common carrier by pipeline, as with any common carrier, is a carrier that holds itself out to carry the product of any shipper who requests transport and is willing to pay the FERC-approved tariff for interstate movements, so long as there is available capacity. See, e.g., *Doe v. Rockdale Sch. Dist., No. 84*, 287 III. App. 3d 791, 794 (3d Dist. 1997) ("A common carrier undertakes for hire to carry all persons indifferently, who may apply for passage so long as there is room and there is no legal excise for refusal")." (App. RB at 23-24)

Applicant argues, "IEPC meets those criteria regarding its SAX pipeline. The fact that despite so holding itself out, at this point in time two committed shippers – one being Marathon – are expected to be using about two-thirds of the pipeline's capacity (Tr. 1344-45) does not cause IEPC to cease being a common carrier and instead to be a contract carrier." (App. RB at 23-24) Applicant provides citations with quotations as support for its argument. (*Id.* at 24)

Applicant states that the terms and conditions of common carrier traffic for movements of interstate petroleum shipments are governed by the FERC; and that FERC approved Enbridge's common carrier tariff structure for oil shipments using the SAX pipeline "under the very circumstances (e.g., long-term commitments to ship) that the Turner Intervenors claim show that it is not such a carrier." (App. RB at 25)

Applicant asserts that FERC by law has exclusive jurisdiction over the rates to be charged by an interstate common carrier by pipeline under tariffs for shipments of oil. Applicant states that in the FERC Docket No. OR13-19-000, it was noted that IEPC told FERC that "the Project currently is sized as a 24-inch pipeline that will provide up to 300,000 barrels per day (BPD) of capacity for crude oil transportation;" that "up to 90 percent of the capacity will be available for committed volumes, while at least 10 percent will be reserved for uncommitted volumes;" that "the Project will require a large capital investment; therefore the success of the Project depends on the support of committed shippers that make long-term ship-or-pay commitments at premium rates;" that "the Commission has recognized the importance of committed shippers to the pipeline's capital financing;" and that while "the Commission has not established a

minimum percentage of capacity that must be set aside for uncommitted shippers . . . the Commission has indicated that a reservation of 10 percent of capacity for uncommitted shippers is sufficient to provide reasonable access." (App. RB at 25, citing Order, Docket OR 13-19-000 at 1, 3, 5) Applicant states that FERC accepted those representations and granted the petition of IEPC, thereby approving tariffs establishing such terms. (*Id.*)

Applicant states, "Turner Intervenors argue that the level of commitment by Marathon and one other shipper to use about two-thirds of the 300,000 bpd capacity of the SAX pipeline, (see, e.g., Tr. 1344-45), a volume well below the 90-percent level approved by FERC, somehow transforms the service provided into "contract service" and affects the pipeline's status as a common carrier." (App. RB at 26) In Applicant's view, that argument "is an impermissible collateral attack on FERC's approval of a common carrier tariff structure for IEPC." (Id.)

Applicant states, "That it is commonplace for common carriers by pipeline to have some of the substantial costs of building pipelines borne by committed shippers is evidenced in FERC's [Order in] Docket No. OR13-19-000, at, 5...." (App. RB at 26)

Applicant claims the cases cited by the Turner Intervenors are distinguishable and provide further support for the SAX pipeline's common carrier status. Applicant asserts that In *Beatrice Creamery Co.*, the court found that defendants were private carriers because all the cargo they carried was being transported under a special contract with the plaintiff, and that the defendants refused to serve other members of the public on several occasions. (App. RB at 27, citing 291 III. App. at 498-499) Applicant argues, "IEPC, by contrast, has contracted with Marathon to allow Marathon to utilize a portion of the SAX pipeline's capacity. IEPC has not refused service to other shippers and in fact already has another committed shipper. (*Id.*) Applicant also argues *Roy v. Illinois Commerce Comm'n*, 322 III. 452 (1926), also cited by Turner Intervenors, has no application to this proceeding. (App. RB at 27)

Applicant states that Turner Intervenors argue that due to the interests of the two committed shippers in the SAX pipeline, the SAX pipeline only serves a "limited business purpose," and therefore eminent domain authority was improperly granted in Docket No. 13-0446. (App. RB at 27, citing Turner IB at 4) Applicant argues, "Even if the grant of eminent domain authority in Docket No. 13-0446 were subject to such collateral attack in these proceedings (and it is not), the Turner Intervenors' reliance on Southwestern Illinois Development Authority is misplaced. There, the Illinois Supreme Court found that a regional development authority did not have the power to take an automobile recycling facility's property and convey it to the operator of a racetrack through the exercise of eminent domain authority. Sw. Illinois Dev. Auth. ..., 199 Ill. 2d 225 (2002)." (App. RB at 27-28) Applicant states, "The court concluded that that conveyance was not made for a public benefit but 'was undertaken solely in response to [the racetrack's] economic goals and its failure to accomplish those goals through purchasing ... the land at an acceptable negotiated price.' Id. at 241." (App. RB at 27-28)

According to Applicant, the "change in diameter does not affect the Commission's determination that the pipeline is in the public interest." (App. RB at 28) Applicant further argues, "Furthermore, Marathon's commitment to utilize a portion of the SAX pipeline's capacity does not convert it into a purely private venture. A common carrier may enter into limited contracts and still serve a public purpose so long as it holds itself out to the public." (*Id.*; citation omitted)

Applicant states that Turner Intervenors have further suggested that even though the SAX pipeline has a 300,000 bpd capacity, if the two shippers using the line are shipping only 210,000 bpd, IEPC would throttle back the pumps on the line so that only 210,000 bpd would be flowing through the line; and that Turner Intervenors suggest that would mean that the SAX pipeline in operating as a private line. (App. RB at 28-29, citing Turner IB at 4; Tr. 1314) Applicant asserts, "But Mr. Maple rejected that theory, stating when asked whether those facts would influence his opinion about whether or not SAX is a private line, "No. Because there's still – I am sure it would take that business on that extra 90,000. If somebody was willing to pay them to ship product, I can't imagine they would pass up that business opportunity and throttle it back." (App. RB at 29, citing Tr. 1314-1315)

Applicant concludes that "there is nothing in the currently known facts regarding committed shippers that would preclude SAX from operating as a common carrier when built. The Intervenors would have the Commission speculate that once built, IEPC will operate SAX in a fashion that violates its FERC tariffs, its certificate from this Commission as a common carrier, Illinois law on common carrier obligations, and Enbridge's long history of operating common carrier pipelines." Applicant contends there is no justification for such speculation and it provides no basis for the relief sought by Intervenors. (App. RB at 29)

Ex Parte Communications

Section IV of Applicant's reply brief is titled, "Allegations of ex parte contacts and backroom deals." (App. RB at 29)

Section IV.A is called, "Alleged Ex Parte Contacts." (*Id.* at 30) Applicant states that Turner and Pliura Intervenors have alleged that Staff violated the ex parte rules based on several conference calls and e-mails between Staff and IEPC concerning IEPC's plans to install a 24-inch diameter SAX pipeline and Staff's urging that IEPC move to reopen and amend the Docket No. 07-0446 certificate for authorization to install that pipeline. Applicant states that copies of each of the alleged ex parte contacts are attached to Applicant's reply brief as Exhibit B. Applicant asserts that Staff has explained in detail why, under the rules of the Administrative Procedures Act, none of these communications violated the ex parte rules. (App. RB at 30)

Applicant states that the first of the alleged ex parte communications was an email from a Staff attorney to Sidley Austin attorney Darryl Reed dated April 23, 2014,

inquiring whether there had been a "size change of the pipeline for the project." (App. RB at 31, citing Turner Ex Parte Ex. 3) Applicant states that there were also three conference calls between Staff and IEPC, one on April 24, 2014, one on May 13, 2014, and one on May 16, 2014. (*Id.*, citing Turner Ex Parte Exhibit 2) Applicant states that "finally, there were four additional emails alleged to be ex parte contacts, two on April 25, 2014, one on April 30, 2014, and one on May 16, 2014 when, following a conference call, an email was sent to IEPC on the same day in which Staff counsel identified specific data requests (ENG 1.9 and ENG 1.24) to be updated or supplemented." (*Id.*, citing Turner Ex Parte Exs. 2, 4, and 5) In sum, Applicant submits, the first alleged ex parte contact was on April 23, 2014, and the last one on May 16, 2014.

IEPC's Motion to Reopen and Amend was filed on May 19, 2014, and the Commission ordered the docket reopened on June 26, 2014. Applicant argues, "Thus, each and every one of the alleged ex parte communications occurred while Docket No. 07-0446 was closed and, indeed, before IEPC had even moved to reopen that docket. On those facts, none of the communications in question are, or can be, ex parte communications with respect to Docket No. 07-0446 as a matter of law." (App. RB at 31) Applicant states that the State Officials and Employees Ethics Act provides that an ex parte communication is "any written or oral communication by any person that imparts or requests material information or makes a material argument regarding potential action concerning ... matters pending before or under consideration by the agency. 5 ILCS 430/5-50(b)." Applicant asserts that the Illinois Administrative Code specifically prohibits as ex parte communications only communications made after "notice of a hearing in a contested case." (App. RB at 31-32, citing 83 III. Adm. Code 200.710) Applicant argues. "Because the proceedings in Docket No. 07-0446 were not reopened until June 26, 2014, all of the communications in question occurred before that date and therefore none can be ex parte communications with respect to Docket No. 07-0446." (*Id.* at 32)

Applicant states that with respect to Docket No. 13-0446, all but two of the alleged communications occurred after the Commission issued its Final Order in Docket No. 13-0446 on April 29, 2014, and hence "for that reason alone cannot be ex parte contacts as a matter of law." (*Id.* at 32) According to Applicant, "that includes the email from Staff counsel to IEPC counsel dated April 30, 2014, which Intervenors have tried to link to the eminent domain proceedings because [Staff counsel] included in the 'Subject' line of the email '13-446/07-0446 Enbridge Pipeline.'" Applicant argues, "Not only was that email sent after the Final Order in Docket No. 13-0446 was issued, but a review of the 'topics' listed in the email makes clear it had nothing to do with whether eminent domain authority was 'necessary' to complete the pipeline, the standard for eminent domain under Section 8-509, 220 ILCS 5/8-509." (App. RB at 32)

As to the two other communications, an Order in Docket No. 13-0446 was entered by the Commission on April 22, 2014. Staff witness Mark Maple testified that by the time of the phone call, "as far as Staff was concerned, [Docket No. 13-0446] was concluded. We had no more . . . analysis to do in that case." (App. RB at 32-33, citing

Docket 07-0446 on reop., Tr. at 1298) At that hearing, Mr. Maple also stated that the phone call "didn't have anything to do with the '13 case." (*Id.*, citing Tr. 1298) Staff has also stated that after the phone call, Staff decided that the issue of size of the pipeline and a request for an amended certificate did not involve the eminent domain case and therefore did not warrant an ex parte report in Docket No. 13-0446. (App. RB at 32-33, citing Staff Response of Oct. 24, 2014 to Turner Motion to Supplement the Evidentiary Record, Docket No. 07-0446 on reop., at 3)

Applicant responds to the argument by Turner Intervenors that IEPC's action in filing a Motion To Reopen And Amend in Docket No. 07-0446 "was undertaken by Enbridge as a result of ex parte communications commencing between ICC Staff and Enbridge before a decision was made in Case 13-0446, which communication was not disclosed in e-Docket Case 13-0446 or in any other ICC case." (App. RB at 33, citing Turner IB at 5-6) Applicant argues, "But that statement simply ignores the facts previously stated. The two communications that occurred prior to the Final Order in Docket No. 13-0446 were after the record had been marked 'Heard and Taken' and after the Proposed Order was in the hands of the Commission." (App. RB at 33) Applicant states that Pliura Intervenors filed an Application for Rehearing in Docket No. 13-0446 raising the 24-inch issue on May 27, 2014, which was denied. Applicant argues, "Notably, the Turner Intervenors did not seek rehearing in Docket No. 13-0446 on this or any other ground, and are therefore estopped from collaterally attacking the Commission's refusal to continue the proceeding based on the change in diameter...." (App. RB at 33)

Applicant also argues, "Moreover, as also discussed, the subject matter of the communication related to whether Docket No. 07-0446 should be reopened to consider amending the SAX certification, not whether eminent domain authority should be granted." (*Id.*)

Applicant argues that "the communications the Intervenors rely on are also not ex parte communications because Staff's participation was investigatory." (*Id.* at 34) Applicant states that the Illinois Administrative Code provides that "ex parte communications do not include those involving Commission employees engaged in 'investigatory, prosecutorial, or advocacy functions'... 83 Ill. Adm. Code 200.710(b)" and that neither the Commission's Rules of Practice nor the Public Utilities Act...prohibit all communications between Staff and parties in pending cases. (App. RB at 34) Applicant states that Staff explained that the phone call on April 24, 2014, was for the purposes of learning more about the change in pipeline diameter and whether that change would require an amendment to the Certificate in Good Standing. (*Id.*, citing Staff Response to Turner Intervenors' Motion to Supplement the Evidentiary Record, Docket No. 07-0446, at 3) Applicant asserts, "The email dated April 23, 2014, which precedes it contains a request by Staff for a phone call to determine 'what is going on with the size change' and 'what may have changed.' Staff was clearly engaged in its investigatory role, and thus those communications are not ex parte communications." (App. RB at 34)

Section IV.B of Applicant's reply brief is titled "Alleged Corruption and Back-Room Dealing." (App. RB at 35)

Applicant states that "Intervenors argue that even if the communications in question were not unlawful ex parte communications, those communications, along with other acts or omissions, constituted 'corruption,' 'back-room dealing,' or 'tainting' of the entire process." (App. RB at 35) The Pliura Intervenors argue that "[w]hether these [ex parte] communications were illegal or not," "[i]t is clear . . . that these previously undisclosed communications were improper," "[t]hey deprived Intervenors substantive and procedural due process", and "they unquestionably tainted the process." (App. RB at 35, citing Pliura IB at 4) Turner Intervenors argue that "[c]orruption has been pervasive." (Id., citing Turner IB at 18)

Applicant asserts, "The suggestion that it was somehow inappropriate for Staff to recommend to IEPC that it file a motion to reopen Docket No. 07-0446 and amend its SAX certificate to provide for a 24-inch diameter pipeline rather than a 36-inch diameter pipeline is truly puzzling. As IEPC has explained ..., until its telephone conversation with Staff on April 24, 2014, it believed it had inherent authority to make the change in the diameter of the SAX pipeline with no need to go back to the Commission." (App. RB at 36) Applicant contends, "Talty v. Commonwealth Edison Company, 38 III. App. 3d 273 (1976) and Weaver v. Natural Gas Pipeline Co., 27 III. 2d 48 (III. 1963) are support for that position. IEPC still believes that as a strict legal matter, that is the law. However, Staff felt there was some doubt on that score and therefore urged IEPC to seek an amendment." (App. RB at 36-37) Applicant argues, "Thus, as Staff has pointed out, '[i]t is through Enbridge Illinois' seeking a reopening of Docket No. 07-0446 and an amended certificate, at Staff's urging, that the Turner Intervenors and others have been afforded the opportunity to raise their concerns in this reopened matter." (Id. at 37) In Applicant's view, "The Turner Intervenors' argument that that is somehow untoward corruption or backroom dealing simply confirms the adage that 'No good deed shall go unpunished." (Id.)

Applicant next asserts, "Equally puzzling are the attacks by Intervenors on Staff's email to IEPC listing possible topics IEPC might address if it filed for an amended certificate." (App. RB at 37) Mr. Maple testified that "these were just things that we thought might end up being important," but that the limited scope of the reopening "made some of the questions irrelevant." (Tr. 1348) When asked why the Staff would make such suggestions to IEPC, Mr. Maple testified, "I think the reason why is if there were going to be a reopening, there would be discovery that Staff would normally do in a new case. And rather than wait and conduct that discovery through numerous writing and answering of data requests, responses, that we put some of our questions in this email, which would shorten the discovery process, basically streamline it" for efficiency. (App. RB at 37, citing Tr. 1306-1307)

According to Applicant, "The critical point is that Staff did not suggest the answers that should be provided on any of those topics, did not indicate what might happen if IEPC failed to address all of the topics, and did not say that IEPC's motion to

reopen and amend would be supported by Staff even if IEPC did provide answers to all of the topics." (App. RB at 38)

Applicant states that Turner Intervenors argue that the scope of these proceedings encompasses the grant of eminent domain made in Docket No. 13-0446 (Turner IB at 10-11) and that the grant of eminent domain authority is also the product of corruption (Turner IB at 15-18). (App. RB at 38) Applicant contends that this argument is without merit.

Applicant argues, "First, the Turner Intervenors' argument that the grant of eminent domain authority was 'wrongful' constitutes an impermissible collateral attack on the final order in Docket No. 13-0446. It is well-established that Commission orders may not be collaterally attacked in different proceedings." (App. RB at 38-39, citing Peoples Gas Light & Coke Co. v. Buckles, 24 III. 2d 520, 528 (1962) ("[O]rders of the Commerce Commission which are within its statutory authority are not void but voidable only, and such orders are not subject to collateral attack."). Applicant also cites City of Chicago v. Commonwealth Edison Co., Dkt. No. 96-0360, 1997 ... (May 7, 1997) (the Public Utilities Act "generally provides that a party may not collaterally attack Commission orders") (App RB at 38)

Applicant asserts that in *Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104 (1951), Appellant filed two complaints with the Commission seeking to vacate two Commission orders by which other companies were granted certificates of convenience and necessity; that the Appellant failed to file an application for rehearing and did not take a direct appeal from those final orders; and that the Supreme Court held that Appellant's new complaints constituted an impermissible collateral attack on the Commission orders. Applicant provides a quote from that decision. (App. RB at 38-39)

Applicant argues, "Here, the Turner Intervenors similarly filed no Application for Rehearing and took no appeal of the final order in Docket No. 13-0446. Thus, the Turner Intervenors are prohibited from collaterally attacking in Docket No. 07-0446 the grant of eminent domain authority made in Docket No. 13-0446. See *Albin v. Illinois Commerce Comm'n*, 87 III. App. 3d 434, 437 (4th Dist. 1980) (holding that plaintiffs waived the merits of a certification proceeding by failing to appeal and could not collaterally attack the certificate in eminent domain proceedings)." (App. RB at 39)

Applicant next argues, "Second, the Turner Intervenors' argument that SAX is a private line and thus the grant of eminent domain authority reflects corrupt practice is equally wrong. As previously demonstrated..., SAX is not a private line under well-established Illinois and federal law, and nothing in the Turner Intervenors' many claims about Marathon's alleged 'ownership' interest converts it into a private line in any fashion." (App. RB at 39)

Applicant next states, "Third, the Turner Intervenors have suggested that the Staff failed in its duties in Docket No. 13-0446 because it allowed the ICC to vote without considering that SAX allegedly had become a private pipeline by virtue of

Marathon's purchase, through Lincoln Pipeline LLC, of a 35% interest in SAX. (App. RB at 39-40, citing Turner IB at 15-16) Applicant argues that a major problem with that theory is that the Commission issued its Final Order in Docket No. 13-0446 on April 29, 2014, but as the 10Q filed by Enbridge Energy Partners, L.P. for the quarterly period ending June 30, 2014, states: "[e]ffective July 1, 2014, Enbridge entered into an agreement with Lincoln Pipeline LLC, or Lincoln, an affiliate of MPC, to, among other things, admit Lincoln as a partner and participate in the Southern Access Extension" and that "Lincoln has purchased a 35% equity interest in the project...." (App. RB at 40, citing Intervenor Turner testimony, Kraft, at 13) Applicant contends that Turner Intervenors do not explain how Staff was supposed to bring to the Commission's attention an equity investment effective two months after the Commission's Final Order in Docket No. 13-0446. (App. RB at 40)

Applicant states that "Turner Intervenors' additionally allege that IEPC misrepresented or withheld material facts in Docket No. 13-0446 concerning IEPC's contractual arrangement with Marathon Petroleum which the Turner Intervenors assert would make Marathon an owner/shipper, and the decision to construct a 24-inch diameter pipeline instead of a 36-inch diameter pipeline, in violation of the Public Utilities Act (220 ILCS 5/5-202.1) which prohibits any misrepresentation or withholding of material information, and Illinois Supreme Court Rule 137, which provides that the signature of an attorney signifies that the information within a pleading is grounded in fact." (App. RB at 40)

Applicant contends, "This allegation is equally wide of the mark. The eminent domain authority granted in Docket No. 13-0446 is not at issue in this proceeding. Nonetheless, IEPC disclosed in Docket No. 13-0446 all facts relevant to the grant of eminent domain authority for the SAX pipeline." (App. RB at 40) Applicant asserts, "First of all, the final decision to use 24-inch diameter pipe was not made until March 11, 2014, well after the record in Docket No. 13-0446 was marked 'heard and taken' in a hearing on December 16, 2013. And as IEPC has explained ..., until the Staff telephone call on April 24, 2014, IEPC believed it had inherent authority to change the diameter of the pipe without Commission approval. By the 24th, the Proposed Order was already in the hands of the Commission. Similarly, the agreement with Marathon went into effect on July 1, 2014, long after the final order was entered in Docket No. 13-0446 on April 29, 2014." (App. RB at 40)

Applicant also asserts that from the time the SAX project was reenergized in 2012, Enbridge publicly discussed, published, and otherwise made known that the SAX project was not likely to require a 36-inch diameter pipeline but rather something smaller in diameter, such as 24-inch diameter pipeline. (App. RB at 41)

Applicant also states that the Pliura Intervenors raised the issue of the change in pipeline diameter in their Application for Rehearing in Docket No. 13-0446, and that the rehearing application was denied by the Commission. IEPC also states that it believed it had inherent authority to change the diameter of the pipeline and that the change in

diameter was not material to Docket No. 13-0446. Thus, IEPC argues, it "did not violate the Public Utilities Act or Illinois Supreme Court 137." (App. RB at 41-42)

V. STAFF POSITION

A. Procedural Background; Statutes and Rules

Section I of Staff initial brief is titled "Introduction/Statement of the Case." (Staff IB at 1-2) In that section, Staff asserts that Turner Intervenors have made unsubstantiated arguments that are based upon false accusations. Staff submits, "The Turner Intervenors state among other things that Staff is corrupt, greased the skids and made a backroom deal with Enbridge Illinois." (*Id.* at 2) Staff provides further examples of such "unsubstantiated accusations" by Turner Intervenors in Section II.E of Staff initial brief. (Staff IB at 5-6)

Section III of Staff's initial brief is titled "Statutes, Commission Rules and Revelant Case Law." In Section III.A, "220 ILCS 5/15-101," Staff argues that Section 15-101 of the PUA "makes it clear that not all sections of the PUA apply to CGS that are granted under the CCPL. In particular, the requirement under Section 8-406(f) that certificates be exercised within 2 years from the grant thereof or else they are null and void (220 ILCS 5/8-406(f)) is not among the sections of the PUA applicable to CCPL CGS such as the Enbridge Illinois' CGS." (Staff IB at 7-8)

In Section III.B, "220 ILCS 5/15-401," Staff asserts that the following language in Section 15-401(b) of the PUA sets forth the requirements for the granting of a CGS under the CCPL, "The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed; a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate." (Staff IB at 8)

In Section III.C, "220 ILCS 5/10-103," Staff asserts that the following language in Section 10-103 of the PUA makes it clear that Staff counsel and Staff employees, such as Mr. Maple, are specifically allowed to have ex parte communications with parties to a proceeding such as Enbridge Illinois: "The provisions of Section 10-60 shall not apply, however, to communications between Commission employees who are engaged in investigatory, prosecutorial or advocacy functions and other parties to the proceeding,..."

Staff contends that throughout this proceeding, the Pliura Intervenors and Turner Intervenors have repeatedly ignored this section of the PUA. (Staff IB at 12)

In Section III.D, "5 ILCS 100/10-60 Illinois Administrative Procedure Act," Staff states that this section of the Administrative Procedure Act sets forth the general law on ex parte communications. Staff further asserts, "Of course, as discussed above, the

PUA specifically allows investigatory Staff and counsel to have ex parte discussions with parties to a proceeding. In addition, ex parte communications can only occur while a matter is open before the Commission." (Staff IB at 13)

In Section III.E, "220 ILCS 5/10-113," Staff refers to the following language in Section 10-113(a): "Anything in this Act to the contrary notwithstanding, the Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it." (Staff IB 13-15)

Staff argues that the emphasized language above from the PUA provides that the Commission can reopen a matter, as it has done in this case, so long as notice and opportunity to be heard are provided to the parties before rescinding, altering or amending any rule, regulation, order or decision made by it. (Staff IB at 15) According to Staff, "Despite Intervenors claims that the Commission has no jurisdiction to grant the relief request..., the PUA does allow the Commission to reopen this matter and exercise its jurisdiction as it has done so in this case." (*Id.*) Staff adds, "Besides this matter, the Commission most recently exercised the same jurisdiction in two previously closed dockets." (Staff IB at 15, citing Docket No. 07-0566, Commonwealth Edison Co., Second Order on Remand, (September 18, 2014); and Docket No. 13-0553, Commonwealth Edison Co., Order (November 26, 2013))

Section III.F of Staff's initial brief is called, "83 III Admin Code 200.710." That section if the Commission's Rules of Practice is "Ex Parte Communications." Staff refers to the following language in Subsection (b): "The following communications are not subject to subsection (a) of this Section: 1) Communications between Commission employees who are engaged in investigatory, prosecutorial or advocacy functions and other parties to the proceeding, ..." (Staff IB at 15-17, emphasis added by Staff)

Staff argues that as set forth in the PUA pursuant to Section 10-103, the emphasized language from the Commission's rules provide that Staff counsel and Staff employees, such as Mr. Maple, are specifically allowed to have ex parte communications with parties to a proceeding such as Enbridge Illinois. Staff asserts, "Throughout this proceeding, similar to neglecting the provisions of Section 10-103 of the PUA, the Pliura Intervenors and Turner Intervenors have repeatedly ignored this language from the Commissions rules, and instead, have based most of their arguments on the rationale that these conversations were somehow improper and thus tainted the entire docket." Staff further argues that it "was under no duty to disclose those discussions to anyone given that the discussion concerned no pending matter before the Commission at the time the discussions took place." (Staff IB at 17)

In Section III.G of Staff's initial brief, "Kreutzer v. Illinois Commerce Com'n ["Kreutzer"] and Albin v. Illinois Commerce Com'n ["Albin"]," Staff argues that the two cases make clear that certificate cases are different from eminent domain cases. (Staff IB at 17-18, citing Albin, 87 III.App.3d at 439, 42 III.Dec. 436, and Kreutzer, 404 III.App.3d 791, 810 (2010)) Staff asserts, "This is a significant matter of law which the

Pliura Intervenors and Turner Intervenors refuse to acknowledge and accept. The appellate court in *Albin* explained that sections 8–406, 8-503, and 8-509 require distinct showings of necessity." (Staff IB at 18) Staff adds, "As explained by the *Kreutzer* court, 'Section 8–406 requires necessity for the project in general, i.e. the provision of 'more reliable electrical service' to the subject area; section 8-503 requires necessity for 'the additions and improvements to implement the more reliable service'; and section 8-509 requires necessity for the 'means of obtaining easements for right-of-way for the additions and improvements." (Staff IB at 18, citing *Albin*, 87 III.App.3d at 439, 42 III.Dec. 436, and *Kreutzer*, 404 III.App.3d 791, 810)

In Staff's view, the two cases are important in showing that the Pliura and Turner Intervenors' argument that Staff had ex parte reportable communications with Enbridge Illinois prior to the time that the Commission reopened Docket No. 07-0446 is without merit. Staff argues, "Since Staff's discussions with Enbridge Illinois did not concern the subject matter of eminent domain which was at issue in Docket No. 13-0446, the only docket pending before the Commission, but rather concerned the certificate issued in Docket No. 07-0446, which had not been reopened, Staff was under no duty to disclose those discussions to anyone." (Staff IB at 18)

B. Contested Issue

Section IV of Staff's initial brief is titled, "Contested Issue – Should the Certificate Previously awarded to Enbridge Illinois be Amended from a Pipeline 36 Inches in Diameter to one 24 inches in Diameter." (Staff IB at 18-20)

According to Staff, the Commission should amend the order and CGS as requested by Enbridge Illinois. Staff' states that its position is based upon the testimony of Mr. Maple, who "reviewed Enbridge Illinois' supplemental responses to Staff data requests ENG 1.9 and ENG 1.24, [the] Motion to Reopen and Amend Order, as well as all of the subsequent filings by Enbridge Illinois and the intervening parties to reach his position." (Staff IB at 18-19)

Staff states that under Article XV of the PUA, "CCPL," essentially there are four criteria for obtaining a certificate in good standing to operate as a common carrier: (1) the application must be properly filed, (2) a public need exists for the service, (3) the applicant is fit, willing, and able to provide the service and (4) the public convenience and necessity requires the issuance of the certificate. 220 ILCS 5/15-401(b). (Staff IB at 19) Staff witness Maple testified that a change in pipeline diameter would in no way change Enbridge Illinois' ability to meet the four criteria necessary for a certificate in good standing. He further testified that only one of the four criteria is even potentially affected by the diameter change proposed by Enbridge Illinois and that would be the issue of public need. (Staff IB at 19, citing Staff Ex. 4.0 at 2)

With respect to public need, Mr. Maple testified that reducing the diameter of the pipeline would not prohibit Enbridge Illinois from meeting the criterion of public need. As part of his analysis and review of Enbridge Illinois' request, Staff requested that

Enbridge Illinois supplement its responses to previously served Staff Data Requests. Mr. Maple then reviewed Enbridge Illinois' responses to those Staff data requests. In response to a Staff data request ENG 1.24, Enbridge Illinois stated the product that will be shipped on the pipeline is still liquid petroleum, as has always been the case. Staff states that the route has not changed; therefore, the regions being served by the pipeline have not changed. (Staff IB at 19)

Staff states that in response to Staff data request ENG 1.9, Enbridge Illinois indicated that it has long-term shipper commitments for the proposed pipeline. Mr. Maple also testified that the construction, operation, and maintenance of the new, smaller pipeline will be the same as the larger pipeline originally approved in this docket. (Staff IB at 20, citing Staff Ex. 4.0 at 3) In Mr. Maple's opinion, essentially, nothing has changed other than the physical size of the pipe and that change does not affect the Enbridge Illinois' ability to continue to meet the public need criterion. (Staff Ex. 4.0 at 3) Mr. Maple concluded that he found no reason to deny Applicant's request to amend the Commission's Order to change the diameter of the pipeline referenced in the order to 24 inches from 36 inches. (Staff IB at 20)

C. Reply Brief

In Section I.A of its reply brief, Staff responds to arguments by Turner Intervenors and Pliura Intervenors regarding the scope of the proceeding. (Staff RB at 2-3)

Among other things, Staff asserts that "Turner and Pliura are attempting to turn this matter into a brand new full certificate proceeding." (Staff RB at 3, citing Turner IB at 12-13; Pliura IB at 1-2) Staff argues, "The case of *Quantum v. Illinois Commerce Commission*, 304 III. App. 3d 310 (1999) specifically addresses that issue. The Commission should not repeat the mistake of *Quantum* in this proceeding." (*Id.*) In Staff's view, "Contrary to what the intervenors claim, before the Commission could rescind its order in Docket No. 07-0446 granting IEPC a certificate, the Commission would have to provide notice to IEPC that such an action could occur. In particular, due process would require that IEPC be given notice that sets forth any alleged violation of the Act, order or rule of the Commission." (Id., citing *Quantum* at 319) Staff adds, "In addition to notice, IEPC would need to be provided an opportunity to be heard through the Commission holding a hearing. ... None of that has occurred with respect to the CGS previously granted to IEPC." (Staff RB at 3)

Section I.B of Staff's reply brief is titled, "Pliura and Turner make outrageous, false, and baseless statements against Staff which must be rejected." (Staff RB at 3)

In subsection I.B.1, Staff argues, "Staff's discussions with IEPC were specifically allowed for by the PUA." (Staff RB at 3-4) Staff arguments were previously made in its initial brief as summarized above.

In Subsection I.B.2, Staff argues, "There was nothing improper with Staff's discussions with IEPC." (Staff RB at 4-5)

Staff contends that Pliura and Turner Intervenors have made "outrageous, unsupported, ludicrous attacks against Staff in their briefs." (Staff RB at 4-5) According to Staff, "No facts exist that support Pliura's and Turner's ludicrous statements against Staff. The lack of specifically identifying facts in the record is particularly telling. Because they can point to no facts, they are able to argue there must be something more amiss." (*Id.* at 5) Staff adds, "All the intervenors can do is use baseless, inflammatory theories to somehow justify what may have gone on. They have to make this incredible leap of conjecture to what may have happened since they have no facts and no such facts exist." (*Id.*) Staff argues, "Accordingly, Pliura's and Turner's false claims should be disregarded and Pliura's argument that Staff witness Maple's testimony 'should be completely ignored' (Pliura IB, 4) should be disregarded." (*Id.*)

In Subsection I.B.3, Staff argues, "Staff was under no obligation whatsoever to disclose its discussions to Pliura and Turner." (Staff RB at 5-6)

Staff asserts that the *Kreutze*r and *Albin* cases "rebuke Pliura's and Turner's claims that Staff had reportable communications with IEPC prior to the time that the Commission reopened Docket No. 07-0446." (Id at 6) Staff states, "Staff's discussions with IEPC did not concern the subject matter of eminent domain, which was at issue in Docket No. 13-0446, the only open and pending docket before the Commission. It only concerned the CGS issued in Docket No. 07-0446, which had not been reopened and therefore was not pending before the Commission." (*Id.*) Staff concludes that it was under no obligation to disclose the discussions to Pliura and Turner and appropriately did not.

VI. PLIURA INTERVENORS POSITION

A. Scope; Merits of Motion

Pliura Intervenors state that the instant proceeding began as a petition for Certificate in Good Standing and request for Eminent Domain authority, docketed as 07-0446; that the Final Order in 07-0446 granted a certificate in good standing to construct, operate and maintain a 36-inch liquid petroleum pipeline to be operated as a common carrier; and that Eminent Domain authority was denied but with leave to seek such authority in a subsequent proceeding if necessary. (Pliura IB at 2)

Pliura Intervenors assert that thereafter, Enbridge took no action on the project until 2012, and that according to Enbridge, this was due in large part to the global downturn in the markets. (*Id.* at 2) Pliura Intervenors state that although there was never a stay entered by any court, during all this time, the project lay dormant; and then, on July 22, 2013, Enbridge filed a petition for eminent domain authority which was docketed at 13-0446. Pliura Intervenors assert that Enbridge therein asserted that it was again proceeding with the approved project following the "Great Recession," was at an impasse with 148 landowners in its attempts to obtain rights-of-way and thus required Eminent Domain authority to complete the project. (Pliura IB at 2)

Pliura Intervenors submit that with a final decision imminent, they discovered that Enbridge had earlier "secretly" decided to change the proposed project from what had been presented in the 07-0446 Final Order and what had been previously affirmed by the Appellate Court in *Pliura Intervenors v III. Commerce Cmm'n*, 405 III. App. 3d 199, 347 III. Dec. 373 (4th Dist. 2010). Pliura Intervenors state that they learned Applicant had changed the project without disclosing that fact in its application for eminent domain. The 07-0446 Order granted Enbridge the authority to construct operate and maintain a 36-inch diameter pipeline. Pliura Intervenors contend that the Appellate Court affirmed the Certificate on the basis of Enbridge's evidence of public benefit related to the transportation of 400,000 to 800,000 BPD of Canadian Heavy Crude to the Patoka hub and on to Midwestern refineries specially adapted to accept this product. (Pliura IB at 3)

According to Pliura Intervenors, the 24-inch project was designed for the purpose of transporting light crude oil from North Dakota to conventionally configured refineries, and "this newly discovered alteration completely obviated the previous evidentiary findings underpinning the 07-0446 order." (Pliura IB at 3)

Pliura Intervenors maintain that during the course of the reopened proceedings, it was further learned that Marathon had purchased a large ownership interest in the proposed pipeline and was the sole "anchor shipper" committing shipments that accounted for nearly the entire capacity of the reconfigured project; and that a single smaller shipper was claimed to exist by Enbridge but it "refused to offer any evidence into the record that this second shipper even existed." (*Id.* at 3) In Pliura Intervenors view, "Whether it did or not, the evidence was clear that this project was no longer a common carrier by pipeline, but was instead a contracted line for Marathon." (*Id.* at 3)

Pliura Intervenors argue that Staff and Applicant engaged in "improper ex parte communications" on substantive matters. (Pliura IB at 4) They assert that Staff submitted an email to Enbridge suggesting what the answers to those data requests should be. (*Id.*) They submit that "Staff should never secretly preview a filing so that is can limit inquiry." (Pliura IB at 15-16) It is observed in this Order that Pliura Intervenors do not identify the documents to which they are referring.

Pliura Intervenors argue that these communications have "tainted the process." (*Id.* at 4) According to Pliura Intervenors, "The current motion must be denied and the underlying Certificate should be revoked. At the very least, the 'testimony' of Mark Maple should be completely ignored." (*Id.* at 4, 15-16)

They argue that even if the testimony is accepted, "it is so overwhelmingly refuted by the other evidence here that it must be rejected." (Pliura IB at 4) They contend that instead, the testimony of Intervenor Carlisle Kelly should be accepted and used as the evidence necessary to deny the motion to amend and to justify initiation of proceedings to revoke the original Certificate. (*Id.*)

Pliura Intervenors assert, "As testified to by Landowner Kelly, in the original proceedings, Enbridge submitted testimony the project was needed to carry heavy petroleum from the Alberta tar sands down to the Gulf Coast. Enbridge submitted expert testimony claiming a public benefit based on expert testimony the project would carry 400,000 barrels of heavy crude." (Pliura IB at 5) Pliura Intervenors cite language from the Order in Docket No. 07-0446 entered July 8, 2008 which summarizes some of the testimony from Enbridge. (Pliura IB at 5-7)

Pliura Intervenors next assert, "Now, seven years after Enbridge initially proposed its 36" pipeline, this has all changed. As Enbridge clarifies in its Motion to Reopen, at pages 2-3, the original plan was to transport 'heavy crude', but Enbridge claims a 'Great Recession' occurred, and market demand fell or halted entirely." (*Id.* at 7) Pliura Intervenors state, "Enbridge now claims at page 4 of its Motion to Re-Open that demand for various petroleum grades has shifted, to 'light oil'. Yet the prior Project 07-0446 was based on testimony submitted in support of the need for, and demand for, 'heavy crude.'" (*Id.*)

According to Pliura Intervenors, "There is not a shred of evidence in the record to support a project to transport 'light oil.' Virtually all of the testimony by the experts hinged on the plan to transport 400,000 barrels each day down to PADD II, in the Midwest." (*Id.*)

Pliura Intervenors argue, "In its Motion to Re-Open, at page 4, Enbridge alleges there is growing refining demand in the US for 'light oil'. Now when you search through the record of 07-0446, there was no testimony giving by any expert as to demand for light oil in the U.S. But rather than start back at square one, and rather than submitting a new application, Enbridge simply tried to argue this was the same project it was previously planning." (Pliura IB at 7)

Pliura Intervenors refer to data request ("DR") No. 1 they sent to Applicant regarding the date upon which Applicant decided to change the pipeline diameter. They contend, in part, that Applicant's response that a final decision was not made until March 2014 is a "misrepresentation." (Pliura IB at 8)

Pliura Intervenors cite the following language in an Order on Petition for Declaratory Order issued by the Federal Energy Regulatory Commission ("FERC") on July 31, 2013, Docket No. OR 13-19-000:

According to Enbridge Illinois, the Project currently is sized as a 24-inch pipeline..... Enbridge Illinois states that the Project is expected to commence service in the second quarter of 2015. According to Enbridge Illinois, the Project currently is sized as a 24-inch pipeline that will provide up to 300,000 barrels per day (bpd) of capacity for crude oil transportation. Emphasizing that the Project involves a substantial capital investment, Enbridge Illinois explains that it conducted a widely-publicized open season from December 12, 2012, to January 18, 2013, seeking term and

volume commitments from shippers in return for priority service at a premium rate. (Pliura IB at 8)

Pliura Intervenors state, "On July 22, 2013, Enbridge filed the 13-0446 petition seeking Eminent Domain authority. That filing said nothing at all about a 24-inch pipeline." (Pliura IB at 8-9) Pliura Intervenors further state, "Obviously, Enbridge knew at that time it was no longer planning a 36-inch pipeline. It also knew it was not planning to transport 'heavy crude', but instead 'light crude'." (*Id.* at 9)

Pliura Intervenors assert, "We know this because on December 12, 2012 through January 18, 2013, Enbridge held its first Open Season for shippers who wanted to commit to long-term contracts to transport on the Southern Access Extension pipeline." (*Id.* at 9)

According to Pliura Intervenors, this change precludes the relief sought by Applicant in this proceeding because to do so would require the ICC to issue an order that lacked supporting evidence. (Pliura IB at 9) Pliura Intervenors add, "ICC Project #07-0446 was a project to construct a 36-inch pipeline to transport heavy Canadian 'crude', basically 'tar sands' petroleum, down from the Alberta tar sands in Canada through Illinois and then on to the Gulf Coast, and other regions." (*Id.*)

They state that the project did not go forward, but now Enbridge is now planning to construct a 24-inch pipeline to carry a different product referred to as light oil; and that in its Motion to Re-Open case 07-0446, at page 4, Enbridge alleges that its Light Oil Access Program will provide light oil market access to Eastern Canada. (Pliura IB at 9)

Pliura Intervenors assert that Enbridge has admitted in its Motion to Reopen that the market for heavy crude from Canada dwindled, but now alleges there is a need for a 24-inch pipeline to transport light oil to Marathon Petroleum Company's refineries in Robinson, Illinois and other refineries Marathon owns. (Pliura IB at 10)

In Pliura Intervenors' view, the change in the size of the pipeline is "hugely important." (*Id.* at 10) Pliura Intervenors state that "Enbridge maintains in its Motion to Re-open that the proposed downsized pipeline, 24-inch in diameter, will be able to transport 300,000 barrels-per-day (bpd) of product." Pliura Intervenors submit that there was "absolutely no testimony in the 07-0446 record about a 24-inch pipeline or what it could transport in any given day." (*Id.*)

Pliura Intervenors state that Enbridge alleged in the original proceeding in Docket No. 07-0446 that increasing the supply of Canadian crude to Illinois would provide economic benefit to Illinois consumers. (Pliura IB at 10-11, citing and quoting Enbridge initial brief in original proceeding) Pliura Intervenors argue, "Now, with the change in the type of product being proposed (light oil versus heavy crude), and with the change in the size of the pipeline from 36-inch down to 24-inch, there is no evidence in the

record to support a need for the project, no evidence that it will benefit the public, and no evidence of public necessity." (Pliura IB at 11-12)

Pliura Intervenors also cite language from the conclusions in the Order in Docket 07-0446 entered July 8, 2009, pages 46-47, "As Staff suggests, 'bringing Canadian petroleum to this [Patoka] hub would provide not only our state, but our nation, with additional crude oil supplies from a friendly and reliable country.' The Commission also agrees with Staff that 'Illinoisans are also citizens of the United States, and a project that provides access to a secure and reliable energy supply and helps to meet our country's energy needs is a project that benefits Illinois citizens, whether directly or indirectly' and that '[t]he changing landscape requires us as a nation to re-evaluate our energy supply and transmission network and make sure that it is as reliable and redundant as possible."

Additionally, at page 47 of the Order, the Commission stated, "Based on the record in the case, including the location of the pipeline which would carry Canadian crude to the major pipeline hub at Patoka, the capacity of the pipeline, the current environment as described by Staff, and other evidence presented, the Commission agrees with Staff that there is a public need for the proposed pipeline."

Pliura Intervenors argue, "The plan is no longer to carry Canadian crude, but is instead proposing to carry Light Crude from areas other than Canada. There is no evidence in the record to support such a project, or even the capacity it is proposing to handle. The record is devoid of any supporting evidence." (Pliura IB at 12)

B. Private Line Issue

Pliura Intervenors state that previously in Docket 07-0446, Enbridge alleged this was going to be a common carrier by pipeline for the proposed 36-inch pipeline; and that now, Enbridge has changed the size of the pipeline to 24-inch, and it has sold a large portion of the project to Marathon Petroleum Company. Pliura Intervenors state, "On information and belief, Marathon Petroleum Company has committed to volumes that will consume nearly the entire capacity of the proposed pipeline" and "has locked up nearly all of the capacity of the 300,000 bpd proposed pipeline." (Pliura IB at 12-13)

Pliura Intervenors argue, "The project has become a contracted carrier for a single large company, Marathon Petroleum Company and that single company has locked up the largest majority of its capacity for its own private refineries. As such, the proposed 24-inch project is now a private project for a single company, for which this project seeks eminent domain." (*Id.* at 13)

Pliura Intervenors state that in Enbridge's Open Season proposal, Enbridge maintained Shippers would have the option of selecting a ten or fifteen-year term for service. (Id., citing Pliura Ex. B) Pliura Intervenors cite Section 15-401(h) of the Common Carrier by Pipeline Act (220 ILCS 5/15-401(h)) which provides, "Each

common carrier by pipeline shall provide adequate service to the public at reasonable rates and without discrimination."

Pliura Intervenors argue, "Obviously, the change in the project from a 36-inch line down to a 24-inch pipeline, and the investment interest purchased by Marathon Petroleum Company with its decision to lock-up 90% of the capacity of the line make it effectively a private line. The remaining available capacity is of *de minimis* value and certainly greatly discriminates against non-committed shippers as compared to Marathon Petroleum Company." Pliura Intervenors state that the Commission received no testimony from Enbridge to explain how such a proposal is not discriminatory in nature. (Pliura IB at 13-14)

Pliura Intervenors assert that "this new evidence is inconsistent with testimony in the original proceeding in 07-0446, where Dale Burgess, Director of the SAX project, testified, 'Prior to building a 36 inch line Enbridge conducted...an open season. ... Numerous producers and shippers want to have the Patoka hub. ... Better access to the Patoka hub is important to shippers...because it will make the desired Canadian crude available to more entities that can process it." (*Id.*, citing Enbridge Ex. 1 at 5-6)

Pliura Intervenors state that in his rebuttal testimony in the original proceeding, Burgess, in explaining why the SAX project was different from the Keystone XL project, testified, "84% of Keystone's capacity is committed to shippers via long term capacity contracts. ...Only 16% of Keystone capacity will be available to shippers on a spot basis. ... In contrast the [SAX] will be a fully open access pipeline. ... Finally, the Keystone project is partially owned by a company that is both a major U.S. refiner and a large producer of Canadian crude oil in contracts to Enbridge with is neither a producer of crude nor a refiner." (Pliura IB at 14, citing Enbridge Ex. 1 at 21)

Pliura Intervenors state that Burgess was referring to ConocoPhillips, co-owners of the Keystone XL project, and that the Applicant "now wishes to turn the testimony and other evidence in 07-0446 on its head." According to Pliura Intervenors, adopting the Keystone model as it has been "reimagined by Enbridge" is a completely different project than what Burgess testified to. Pliura Intervenors argue that now there is one "big shipper" accounting for a stated percentage of the committed capacity of the SAX; the percentage to which they refer is well in excess of 90%. They add, "That one shipper is Marathon, a major refiner and now a co-owner of the SAX." (Pliura IB at 15) The more specific percentage to which Pliura Intervenors refer is identified in the transcript of the hearing.

They further argue, "There is just one other small undisclosed shipper committed to this project and little remaining capacity for spot shippers." (Pliura IB at 15) They add, "No longer are 'numerous producers and shippers' apparently clamoring for more capacity to move Canadian crude to Patoka. That need, if it ever existed, has evaporated. This project looks nothing like what was approved in the underlying 07-0446 proceeding." (*Id.*)

C. Reply Brief

Section I of the Pliura Intervenors" reply brief contains their "reply to Applicant's [initial] brief." In Section I.A, "Background," Pliura Intervenors assert that the "Background" section of Applicant's initial brief is "self-serving, incomplete and inaccurate." (Pliura RB at 1-5)

In Section I.B of their reply brief, "Scope," Pliura Intervenors argue that Applicant's position ignores the relevant issues raised by Intervenors directly related to the unilateral change in the pipe diameter and capacity. They contend that when Applicant changed the diameter of the proposed project, "thus changing its capacity, and changed the source of the product primarily to be moved, and changed the intention of the project from a true common carrier by pipeline to an exclusive pipeline for co-owner Marathon, everything has changed." (*Id.* at 6) In Pliura Intervenors' view, "It was IEPC's burden to present evidence in support of the new project and it has utterly failed to do so." (*Id.* at 7)

In Section II.a of their reply brief, Pliura Intervenors respond to Staff's initial brief regarding "Scope." According to Pliura Intervenors, "Applicant has not only changed the diameter of the pipeline, but the primary product to be shipped." (Pliura RB at 8) They assert that "nearly all of the capacity of the pipeline is committed to co-owner Marathon" and will primarily be used for "shipping light crude for Marathon to Marathon refineries;" and that the "reconfigured project is not a Common Carrier." (*Id.* at 8-9)

In Section II.b of their reply brief, Pliura Intervenors respond to Staff's initial brief regarding "Ex parte Communications." Pliura Intervenors argue, "A plain reading of what little documentation exists as to the ex parte communications demonstrates that the Staff was not engaged in 'investigatory, prosecutorial or advocacy functions." (*Id.* at 9)

They further argue that Staff has failed to explain "how and why it is appropriate for Staff to preview filings and suggest answers to data requests." (Piura RB at 10) It is observed in this Order that Pliura Intervenors do not identify the documents to which they are referring.

Pliura Intervenors also contend that "the integrity and impartiality of the Staff's conclusions has been undermined." (Pliura RB at 9-10)

In Section III of their reply brief, "Conclusion," Pliura Intervenors argue, "The law is clear that the ICC has the authority and the obligation under these circumstances to immediately move to revoke the underlying certificate in good standing, so long as due process is afforded." (Pliura RB at 10, citing *Quantum Pipeline Co. v. Illinois Commerce Comm'n*, 304 III. App. 3d 310; see also Pliura IB at 16)

In their draft order, Pliura Intervenors argue that the Certificate has expired, based on Section 8-406(f) of the Act which states, in part, "Unless exercised within a period of 2 years from the grant thereof authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void." (Pliura draft order at 11-14)

VII. TURNER INTERVENORS POSITION

A. Summary and Discussion of Procedural History

Section I of Turner Intervenors' initial brief is titled "Introduction." As part of Section I, Section I.A contains their "Summary and Discussion of Pertinent Excerpts of Procedural History."

In Paragraph 4 of that section, they state that Applicant filed a Petition for Eminent Domain Authority in Docket No. 13-0446, and that there were several major facts not disclosed in Case 13-0446 by Enbridge. (Turner IB at 3-4)

Turner Intervenors assert, "Among those were: (a) Enbridge's contractual arrangement with Marathon Petroleum to provide it with a shipping space priority guarantee in return for Marathon's anchor shipping commitment to use the SAX, under a ship or pay arrangement, (b) the terms of the option by Marathon to purchase an interest in the SAX, which has so far been disclosed as a 35 percent interest, (c) the almost complete absence of any shipping demand for the SAX other than Marathon and a much smaller shipping interest from an unnamed shipper, (d) the ability to throttle back the pumps which control shipping volume so that the SAX can be operated in a way where the entire capacity is devoted only to the two long-term shipping commitments, and (e) Enbridge's decision to not construct a 36" pipeline project for the SAX." (Turner IB at 3-4)

Further arguments in Paragraph 4 are summarized below in the description of the arguments made in Section I.B.4 of their initial brief.

In Paragraph 5 of Section I.A, Turner Intervenors contend that the Motion to Reopen and Amend Order filed May 19, 2014 was "a result of ex parte communications commencing between the ICC Staff and Enbridge before a decision was made in Case 13-0446, which communication was not disclosed on the e-Docket in Case 13-0446 or in any other ICC case." (Turner IB at 5-6) Turner Intervenors argue, "Back room deal-making is abhorrent to Illinois administrative justice. What has been disclosed indicates that the ICC Staff and Enbridge agreed in advance that what would happen in the reopened case, as between them. Evidence was scripted in advance, rather than presented by Enbridge and investigated in the light of the applicable statutes by the ICC Staff." (*Id.* at 6) It is observed in this Order that in their initial brief, Turner Intervenors did not identify the documents to which they were referring. Previously, they did offer five items into evidence as Turner "Ex Parte Exhibits" 1 through 5; four of these items

were e-mails, and some of these items were included in Turner Intervenors' reply brief. The five exhibits were also attached to Applicant's reply brief.

Turner Intervenors argue that there has been "no interest" by the ICC Staff to look into the "private line" issue discussed below, and that "failing to consider this substantial undisputed fact will pervert both the Common Carrier by Pipeline Act and the eminent domain decision of the Illinois Supreme Court in *Southwestern III. Dev. Auth. v. National City Environmental*, ... 199 III.2d 225, 263 III. Dec. 241 (2002)." (Turner IB at 6) Turner Intervenors further contend, "Overall, analysis by the ICC Staff after the Motion to Reopen was filed has been nearly non-existent." (*Id.*)

B. Legal Standards

Scope

Section I.B. of Turner Intervenors initial brief is titled "Legal Standards." Section I.B.1 addresses the "Scope of Instant Cases Created by Issues Presented."

According to Turner Intervenors, "Initially defining the scope of this proceeding would be Enbridge's Motion to Reopen. The Motion used to reopen was voluntarily adopted by Enbridge as its case Petition and/or its evidentiary case in chief for this case. The Motion/Petition/evidentiary case in chief, raised several factual issues, which would frame at least the initial scope of this case." (Turner IB at 10)

Turner Intervenors next assert, "Major issues developed by the Turner Interveners in this case, i.e.) a wrongful eminent domain decision in Case 13-0446 based on pertinent facts being withheld from the ICC and the privacy issue surrounding Marathon Petroleum's inability to have rights under the Common Carrier by Pipeline Act and no right to exercise eminent domain authority, were expressly placed in issue in this case by Enbridge's May 19, 2014 Motion." (Turner IB at 10)

Turner Intervenors further state, "Paragraphs 2-5 state in an elaborate way the issue of eminent domain authority, asserting that this issue has been resolved. Paragraph 6 expressly places Marathon's interest in the SAX inside the scope [of] this case." (*Id.* at 10-11) The Turner Interveners assert that they have raised issues of improper ex parte communications between Enbridge and Staff which "was accidently discovered while trying to interpret what Enbridge was saying in response to the shipping commitments it had received for the SAX." (*Id.* at 11)

Turner Intervenors claim "the goal of this proceeding by Enbridge was eminent domain authority for a downsized 24" pipeline project without there ever being an eminent domain analysis" and that "this goal also explains the failure of Enbridge to make a proper disclosure of what its plans were in Case 13-0446, while this case was pending." (*Id.*)

Section I.B.2 of Turner Intervenors initial brief is titled, "Scope of Instant Case Created by Statute."

According to Turner Intervenors, the scope of this proceeding is also set forth in the statutes regulating how Enbridge would obtain permission to commence construction, either with or without eminent domain authority. Turner Intervenors state that protection of the landowner with respect to the Common Carrier by Pipeline Law begins by a notice being sent the affected landowners pursuant to 220 ILCS 5/15-401(d). (Turner IB at 12)

Turner Intervenors assert that landowner participation is then authorized in 220 ILCS 5/15-401(b)(5) and (7); that landowner participation is not limited to any one set of topics, and includes all of the 220 ILCS 5/15-401(b)(1)-(9) factors and "other relevant factors"; and that authority for eminent domain cannot be created for a crude oil pipeline project other than by beginning it under this procedure. (*Id.*)

Turner Intervenors state that the instant case was initiated under Section 8-503 within the 2007 case, and seeks an amendment to the Certificate In Good Standing issued on July 8, 2009; and that the "major factual support" for the amendment is a downsized project, a change in the focus of shipping demand to light crude, and the shipping interest of co-owner, anchor shipper Marathon Petroleum Company. Turner Intervenors also contend that Section 8-503 does not provide an absolute right to Enbridge to downsize; and does not provide "a way so that an amended certificate would be accompanied by eminent domain authority, in this case, since the eminent domain decision in Case 13-0446 was based on the 2007 and 2008 facts, and not on the materially different facts underlying Enbridge's newly downsized project proposal." (Turner IB at 12)

Turner Intervenors next assert that the basis available "to set the proper scope in reopened 07-0446" are the factors contained in 220 ILCS 5/15-401 and 220 ILCS 5/8-503; that the reopened case is a Section 15-401 proceeding; and that Section 8-503 is asserted by Enbridge as the basis for its amendment. (Turner IB at 12-13)

They state that Section 15-401 provides that Enbridge "shall begin ... construction of a pipeline" only after it has a relevant Certificate and provides for a consideration of whether "a public need for the service exists"; whether "the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders"; whether the public convenience and necessity requires issuance of the certificate; nine broadly worded factors; and other relevant factors. (*Id.* at 13)

Turner Intervenors argue, "It is a Section 15-401(b) certificate for a 24" pipeline which Enbridge needs to have authority to commence construction. This provision also is basis for the ICC to deny eminent domain authority to Enbridge in this case." They further contend, "Section 8-503 provides that when 'a new structure ... is ... necessary' for the "the security or convenience of ... the public ... or in any other way to secure

adequate service or facilities, the Commission shall ... order ... such... ." (Turner IB at 13)

Due Process

Section I.B.3 of Turner Intervenors' initial brief is titled, "Due Process Limitations of the Instant Case."

According to Turner Intervenors, ICC decisions are also required to recognize property rights. They state that the property rights of Enbridge have been asserted with respect to its July 8, 2009 Certificate In Good Standing originally granted; that Enbridge describes itself as a certificate owner in its Motion to Reopen; that Enbridge "does not desire to lose any accomplishment still existing" in the decision made in the 2007 case; and that the landowners are also the holders of property rights, which "seems forgotten" in the rush in this case. (Turner IB at 13)

Turner Intervenors argue, "It is fair to say that both sides cannot have their property right affected by an ICC action without prior notice. None of the landowners have been notified that the instant case is for the purpose of considering eminent domain authority for Enbridge's new project, and so therefore, it would be inappropriate for an amended certificate to be accompanied by eminent domain authority." (*Id.* at 13-14)

Turner Intervenors contend that when an ICC hearing affects property rights, due process, created by a notice, must exist; and that "the absence of due process, i.e.) no notice or a defective notice, causes the decision to be invalid. *Quantum Pipeline Co. v. Illinois Commerce Com,...* 304 Ill.App.3d 10 (3rd Dist. 1999)." (Turner IB at 14) They submit that the rights of the landowner in this case would be substantially prejudiced, if the outcome of the instant case is approval of the diameter reduction, and attached to the newly issued Certificate is eminent domain authority; and that it "would be improper to create an eminent domain authority by multiple confusing hearings, where the complete facts of a proposed project are not considered in the light of the constitution limitations on eminent domain authority." (*Id.*, citing *Southwestern Ill. Dev. Auth.*, 199 Ill.2d 225)

Turner Intervenors argue, "Efforts by Enbridge to hide the facts surrounding Marathon Petroleum's private use the SAX should now cause Enbridge to lose any eminent domain authority it briefly held for its July 8, 2009 Certificate." (*Id.*)

Eminent Domain: Private Line Issue

Section I.B.4 of Turner Intervenors' initial brief is called, "Outcome of the Instant Case with Respect to Eminent Domain Authority."

Turner Intervenors argue, "An authorization for condemnation may issue only upon evidence justifying the "proposed plan for development of the project.....Kreutzer v.

III. Commerce Com'n, ... 404 III.App.3d 791 (2nd Dist. 2010)." (Turner IB at 14) They add, "To this end planning must be done by those knowledgeable in the area of concern, with input permissible by others who may be affected by the program." (*Id.*, citing *Illinois Power Co. v. Lynn*, 50 III.App.3d 77, 8 III.Dec. 26 (4th Dist. 1977))

Turner Intervenors also cite language in *Lakehead Pipeline Co. v. Illinois Commerce Com'n*, ... 296 Ill.App.3d 942 (3rd Dist. 1998) ("*Lakehead*"): ".... The Commission remains solely in charge of supervising and protecting the public's general welfare with respect to public utilities. See 220 ILCS 5/4-101 (West 1996). Through section 15-401, it must determine whether this state deems the project worthy of certification so as to potentially permit condemnation authority. It does not determine whether the pipeline should enter the market. In fact, the Commission concedes that Lakehead is free to build a pipeline under a federal scheme just as it built line 6A, without first acquiring certification. But in so doing, Lakehead will have no condemnation authority." (Turner IB at 14-15)

Turner Intervenors state that there exists no evidentiary finding by the ICC that eminent domain is appropriate for a 24" pipeline which has primarily one private business user, and no legal analysis made by the ICC which says that eminent domain authority is appropriate for a single shipper/owner for a \$300,000,000 crude oil pipeline project. They argue that neither outcome would be legally supportable under *Southwestern III. Development Authority*, 199 III.2d at 225, and the "proposed pipeline primarily for Marathon Petroleum has not been considered in an ICC proceeding where the award of eminent domain was made a topic with due notice to the landowners." (Turner IB at 15; see also Turner IB at 4-5)

Turner Intervenors assert that *Southwestern III. Development Authority* "prohibits the use of the power of eminent domain for limited business purposes," and that in this context, the limited business purposes would be those of Marathon Petroleum and the unnamed smaller shipper, not Enbridge. (Turner IB at 4-5) Turner Intervenors also argue that "it was a violation of Supreme Court Rule 137 for Enbridge's lawyers to propose an order in Case 13-0446, after Enbridge made the final business decision to downsize its pipeline project, without advising the ICC of this material change." (Turner IB at 4-5)

According to Turner Intervenors, what should have happened before the ICC voted in Case 13-0446 was for the ICC Staff to either file a Motion to Dismiss or to make an application under Section 200.870 for an additional hearing. (Turner IB at 15-16)

Turner Intervenors state that it is now known that Enbridge had contracted with Marathon Petroleum to sell 35% of the SAX for nearly \$300,000,000, and that at least 35% of the SAX would be used by Marathon as its private line. They argue that there is no exception in either the Common Carriage by Pipeline Act or eminent domain law in Illinois, for an entirely private purpose pipeline, costing approximately \$300,000,000, to be certified or to be granted eminent domain authority. (Turner IB at 16-17)

They further contend, "Neither does FERC regulate the rates for a privately owned pipeline. 49 U.S.C. app. § 1(1)(b) and § 1(3)(a). When FERC made its SAX decision to allow guaranteed shipping priority to shippers making long-term written shipping commitments, FERC had no idea that 35% of the SAX would be completely private, and not engaged in common carriage." (*Id.*)

Turner Intervenors argue, "A private pipeline has no rights under the Illinois Common Carriage by Pipeline Act. 220 ILCS 5/15-401(h) provides that '(e)ach common carrier by pipeline shall provide adequate service to the public at reasonable rates and without discrimination.' 220 ILCS 5/15-201 defines common carriage by pipeline to transportation services for the public, not for oneself." (Turner IB at 17)

They further argue, "Marathon Petroleum is not engaged in common carriage when it is both and owner and an operator." (*Id.*, citing *Roy v. Illinois Commerce Comm'n ex rel. North Shore Connecting R.R.*, 322 III. 452, ... (1926), and *Beatrice Creamery Co. v. Fisher*, 291 III.App. 495, ... (4th Dist. 1937))

Turner Intervenors contend that approval by the FERC of the "priority shipping access" does not preempt the nondiscriminatory requirements of Section 15-401(h). Enbridge, when known as Lakehead, helped establish the precedent in this respect in the case of Lakehead.... There the Third District Appellate Court stated, 'Unless preempted by the federal government, state law governs certification, which is a necessary first step in acquiring eminent domain power. See *Iowa RCO Ass'n v. Illinois Commerce Comm'n*, 86 Ill.App.3d 1116, 42 Ill.Dec. 582, ... (1980)." (Turner IB at 17)

Turner Intervenors argue, "The issue in the *Lakehead* case related to the ICC denying eminent domain authority for an new pipeline around the greater Chicago area, but the same legal principle applies in this case, to an amendment to a Certificate In Good Standing. The ICC cannot ignore Illinois statute because of a FERC decision." (Id. at 18)

They contend that regardless of what decision is made in the instant case, the ICC should specifically provide that Enbridge does not have eminent domain authority associated with its new 24" pipeline project. (*Id.*)

Ex Parte Communications

In Section I.B.5 of their initial brief, Turner Intervenors further address purportedly improper ex parte communications between Applicant and Staff. (Turner IB at 18-22) They argue that "corruption has harmed the Turner Interveners due process rights." (*Id.* at 18) Turner Intervenors contend that "the ex parte communications occurred over a period of many weeks..." and that "no excuse exists for the ICC Staff's failure to file an ex parte report on the e-Docket in case 13-0446." (*Id.*)

It is observed in this Order that in their initial brief, Turner Intervenors did not identify the ex parte documents to which they were referring. They did previously offer five items into evidence as Turner "Ex Parte Exhibits" 1 through 5; four of these items were e-mails. Some are contained in Turner Intervenors' reply brief. The five exhibits were also attached to Applicant's reply brief.

Turner Intervenors assert that Section 200.25(a) of the Rules of Practice "provides the legal obligation of the ICC Staff, which was to create 'a complete factual record to serve as basis for a correct and legally sustainable decision," and that failure by ICC Staff to disclose known facts prior to the decision in Docket 13-0446 was contrary to 200.25(a). (*Id.* at 18-19)

Turner Intervenors argue that "the seriousness continued into the instant case by the actions of the ICC Staff to constrain the scope of the instant proceeding and to totally ignore the impact of allowing Marathon Petroleum to own and ship on its own private pipeline." (*Id.* at 19)

Turner Intervenors state that Section 100.20(b) of the Rules of Practice provides in part that an employee of the Commission "should avoid any action that might result in, or create the appearance of ... (2) Giving preferential treatment to any interested party; ... (4) Losing complete independence or impartiality; ... (6) Affecting adversely the confidence of the public in the integrity of the Commission." They contend that Staff's actions were contrary to this section. (Turner IB at 19-20)

Turner Intervenors also argue that their due process rights have been prejudiced, and that the harm to them has been significant enough for this case to be decided against Enbridge. (Turner IB at 20, citing and quoting from *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 III.App.3d 1023 (1st Dist. 1988))

C. Reply Briefs; Draft Order

Reply Brief to Applicant

In their reply brief to Applicant, Turner Intervenors state that Applicant's Initial Brief "raises the issue of repeating litigation." (Turner RB to App. at 1)

Turner Interveners assert that there is "missing litigation, which denies due process to the Turner Interveners." (*Id.* at 1) They state, "A newly proposed SAX project, with Marathon having a prominent role, has not been litigated for the purpose of eminent domain. For comparison, the Turner Interveners have not requested reconsideration of the route and have not presented any arguments or supporting material with respect to the steel used for the proposed pipe." (*Id.*)

What the Turner Interveners object to "is having the ICC adopt the decision in Case 13-0446 for the newly proposed SAX project." They argue that Case 13-0446 did not consider the application of *Southwestern III. Dev. Auth.* "with respect to dominate

shipper/owner Marathon" and that the "legal effect created by Marathon's prominent role would be considered for the first time, not repeated." (*Id.*)

Turner Intervenors contend, "If the instant case approves the downsizing, it would be appropriate for the decision to also hold that at this time, the amended certificate does not have eminent domain authority." (*Id.*)

Turner Intervenors argue that such a decision would not create a need to repeat litigation for the new SAX proposal, since this step has not occurred, either before or after the recent disclosure of Marathon's co- ownership; and would also not exceed the scope of the instant case, and only apply to the amended certificate. (*Id.* at 2)

Reply Brief to Staff

Preliminarily is it observed that reply briefs are intended to provide an opportunity to "reply" to other parties' initial briefs. Reply briefs are not intended to provide an opportunity to file supplemental initial briefs, to which other Parties have no opportunity to respond. Turner Intervenors' 38-page reply brief to Staff appears to be more in the nature of a supplemental initial brief. Although there is a cite to the "first sentence" in Staff's initial brief, and a cite to page 17 and to page 19 of Staff's initial brief, as noted below, the reply brief contains very few specific citations to the Staff initial brief to which it is purportedly replying.

Section I of Turner Intervenor' reply brief is described as an introduction.

Section II is titled, "Marathon Petroleum is the Centerpiece of the Contested Issues in this Case." Turner Intervenors assert that "Staff in the first sentence of their Initial Brief, concurs with the Turner Interveners on the scope of this case when stating: 'The Commission reopened this matter for a very limited purpose. ... whether to construct, operate, and maintain the Southern Access Extension Pipeline ... as a pipeline 24 inches in diameter instead of a pipeline 36 inches in diameter." (Turner RB to Staff at 3)

Turner Intervenors contend that the "ICC Staff, by this sentence, has framed the scope of this case, albeit using language from the notice of reopening, placing in issue the proposed 'operation' of the new 24" SAX project." (*Id.* at 3)

Turner Intervenors argue, "On the merits, the newly proposed SAX operation has been the single point of the opposition by Turner Interveners, on the substantive issues. A meaningful portion, if not all, of the SAX has been proposed to be operated as a private line exclusively for Marathon." (*Id.* at 4)

Section III of the reply brief further addresses the scope of the case on reopening. (Turner RB at 12-14)

Section IV is titled, "The ICC Staff violated duties owed the ICC and public and participated intentionally in a process to deny the Turner Interveners due process." (Turner RB to Staff at 14-24)

Turner Intervenors argue in part, "The ICC Staff is also inaccurate when describing the scope of the ex parte communications. A continuous stream of ex parte communications over a period of several weeks did not focus on the multiple subtle differences in the definition of the word 'necessity.' The discussion on page 17 under Section G of the ICC Staff Initial Brief is irrelevant." (*Id.* at 16-17)

Section V of Turner Intervenors' reply brief is titled, "The ICC Staff legal analysis must be completed before section 200.25(a) has been complied with." (Turner RB to Staff at 24)

Subsection A of Section V is titled, "Prior ICC cases are not persuasive." (Id. at 25)

In Subsection B of Section V, Intervenors argue, "At issue is a new major proposal not previously certified and materially distinguishable from the proposal described in the July 8, 2009 CGS." (Turner RB to Staff at 26)

Subsection C of Section V is titled, "Eminent domain authority can neither linger or otherwise exist for the new SAX proposal." (*Id.* at 27-34)

In Subsection D of Section V, Turner Intervenors argue, "Marathon's private use is ineligible for benefits under the Common Carrier by Pipeline Act." (*Id.* at 34)

Subsection E of Section V is titled, "Enbridge has proven itself unfit." Turner Intervenors state, "The ICC Staff analysis of law starting with Section G on page 17 of their Brief... is incomplete and/or only distantly related to the contested issue in this case, except for one issue. Does Enbridge now pass the fitness test, noted by the ICC Staff on page 19 of its Initial Brief?" Turner Intervenors contend that "the failure to present a case well-grounded in fact and law after full disclosure is highly probative that Enbridge cannot be considered fit." (Turner RB to Staff at 35)

In Subsection F of Section V, Intervenors argue, "No evidence supports common carriage." (*Id.* at 35-36)

Subsection G of Section V is titled, "Corruption should not be tolerated." (Turner RB to Staff at 36-37)

Subsection H of Section V is titled, "The new SAX project creates a substantially greater harm to the land, but not in a physical sense." (*Id.* at 37-38)

Draft Order

Turner Intervenors also filed a draft order. In that draft order, "Turner Intervenors' Position" is on page 2 and it states, in its entirety, as follows:

The Turner Interveners assert that the proposed amendment is being requested for a private pipeline project where Marathon is the primary shipper and co-owner of 35% of IEPC. Since a private pipeline is not under the purview of the Common Carrier by Pipeline Law, the Motion of IEPC should be denied. Additionally, the Turner Interveners also assert that the proposed amended Certificate In Good Standing should not have eminent domain authority because the role of Marathon has not been made the subject matter of an eminent domain hearing and because the decision in Case 13-0446 is void, since IEPC abandoned the project described in the original Certificate In Good Standing as early as 2009. Lastly, the Turner Interveners assert that a nondisclosure of material fact by IEPC and ex parte communication between IEPC and the ICC Staff prior to the filing of the Motion, commencing during the Case 13-0446 have corrupted the hearing process, thus justifying a decision denying the Motion. (Turner draft order at 2 of 2)

VIII. FERC ORDER

In this proceeding, multiple Parties cite an "Order on Petition for Declaratory Order" in Docket No. OR13-19-000, issued by FERC on July 13 2013. 144 FERC 61,085. The FERC order grants the petition, which was filed by Enbridge Pipelines (Illinois) LLC.

Paragraph 1 of the Order states, in part, "Enbridge states that approval of the Petition will support its proposed Southern Access Extension Project (Project), which will provide new pipeline capacity to transport crude petroleum from Flanagan, Illinois, to the pipeline hub at Patoka, Illinois. Enbridge Illinois explains that the Project involves construction of a new 165-mile pipeline ..."

Paragraph 3 states, in part, "Enbridge Illinois states that the Project is expected to commence service in the second quarter of 2015. According to Enbridge Illinois, the Project currently is sized as a 24-inch pipeline that will provide up to 300,000 barrels per day (bpd) of capacity for crude oil transportation."

That paragraph also states, "Emphasizing that the Project involves a substantial capital investment, Enbridge Illinois explains that it conducted a widely-publicized open season from December 12, 2012, to January 18, 2013, seeking term and volume commitments from shippers in return for priority service at a premium rate. Enbridge Illinois also states that it intends to conduct an additional open season, and depending on the results of the additional open season, Enbridge Illinois states that it may increase the size of the pipeline to 30 or 36 inches. Enbridge Illinois adds that up to 90 percent of

the capacity will be available for committed volumes, while at least 10 percent will be reserved for uncommitted volumes."

Paragraph 5 states, "Enbridge Illinois asks the Commission to confirm that: a. for the terms of their Transportation Service Agreements (TSA), the committed shippers will pay the rates calculated under the TSAs applicable to the open season in which they participated; b. Enbridge Illinois can provide up to 90 percent of the capacity created by the Project as priority committed capacity at a premium rate for the committed shippers that signed TSAs during one of the open seasons; c. Enbridge Illinois can implement a tariff rate structure for both committed and uncommitted shippers that includes a base rate and a separate power charge that will be trued up to actual power costs at the end of each calendar year; and d. Enbridge Illinois can implement a lottery provision for allocation of uncommitted space to prevent any uncommitted shipper's allocation from falling below the minimum batch size during periods of prorationing."

Paragraph 6 states, in part, "Enbridge Illinois states that the Project will provide additional market access for crude oil transported from both Canada and the Bakken Region of the U.S. on the Enbridge Energy Partners, L.P. Mainline System...."

It also states, "Enbridge Illinois maintains that the expanded capacity linking production in the north to refineries served through Patoka will provide a long-term, stable, and reliable source of energy, which will enhance our nation's energy security and independence."

Paragraph 8 states, in part, "Enbridge Illinois asserts that the Project will require a large capital investment; therefore, the success of the Project depends on the support of committed shippers that make long-term ship-or-pay commitments at premium rates."

Paragraph 13 states of the Order states, in part, "... Enbridge Illinois maintains that the Commission has approved requests for priority service on terms directly comparable to those it proposes in the Petition."

Paragraph 14 states, "Similarly, continues Enbridge Illinois, the Commission has approved other requests to offer priority service to shippers that entered into long-term volume commitments in support of similar projects, while also preserving access for uncommitted shippers.8 Enbridge Illinois points out that the Commission recognized the importance of committed shippers to the pipeline's capital financing, distinguishing those shippers from uncommitted shippers, which are not required to ship or pay each month."

Paragraph 15 states, "Enbridge Illinois contends that its proposal is consistent with Commission precedent in reserving 90 percent of capacity for committed volumes, while ensuring that uncommitted volumes have access to 10 percent of the capacity. Enbridge Illinois points out that the Commission has not established a minimum percentage of capacity that must be set aside for uncommitted shippers, but asserts

that the Commission has indicated that a reservation of 10 percent of capacity for uncommitted shippers is sufficient to provide reasonable access."

Under "Commission Analysis," Paragraph 23 provides, "The Commission will grant the Petition. The proposed terms of service and rate structure for committed and uncommitted shippers are permissible under the ICA and are consistent with applicable Commission policy and precedent regarding priority service terms and rates that can be offered to shippers that commit volumes through an open season to support a new infrastructure project. Since its decision in Express Pipeline P'ship,15 the Commission has recognized that shippers making longer-term commitments incur costs and liabilities and undertake risks that make them not similarly situated with shippers that are unwilling or unable to do so."

Paragraph 24 provides, in part, "To minimize the risk that the Project will not move forward, and to provide financial assurance to Enbridge Illinois, the TSAs require shippers to commit to ship-or-pay contracts at premium rates for initial 10 or 15-year terms. In exchange for these commitments, Enbridge Illinois will reserve 90 percent of the capacity for those shippers and will assure such shippers that it will not prorate their committed volumes. Additionally, Enbridge Illinois will provide an appropriate amount of capacity (10 percent) for uncommitted shippers that do not provide the financial assurances that the committed shippers provide."

IV. COMMISSION ANALYSIS AND CONCLUSIONS

Background

On July 8, 2009, the Commission entered an Order in Docket No. 07-0446. The Commission therein ordered that Enbridge Pipelines (Illinois) L.L.C. (n/k/a Illinois Extension Pipeline Company, L.L.C) was "granted a Certificate in Good Standing pursuant to Section 15-401 of the Common Carrier By Pipeline Law." There it was "authorized, pursuant to Section 15-401 of the Common Carrier By Pipeline Law, to construct, operate and maintain the proposed 36-inch pipeline as described in [the] order and to operate as a common carrier by pipeline within an area sixty feet wide and extending approximately 170 miles along the route identified in Attachments A and B to the petition in Docket No. 07-0446."

Section 15-0401 of the PUA provides, in part:

(b) Requirements for issuance. The Commission, after a hearing, shall grant an application for a certificate authorizing operations as a common carrier by pipeline, in whole or in part, to the extent that it finds that the application was properly filed; a public need for the service exists; the applicant is fit, willing, and able to provide the service in compliance with this Act, Commission regulations, and orders; and the public convenience and necessity requires issuance of the certificate. ...

The authorized route runs from an Enbridge terminal at Flanagan in Livingston County, Illinois to a point of termination at a pipeline hub near Patoka, Illinois in Marion County.

The Commission further ordered that "the proposed pipeline is necessary and should be constructed, to promote the security or convenience of the public, pursuant to Section 8-503 of the Public Utilities Act."

The Commission further ordered that "Petitioner's request under Section 8-509 of the PUA for authorization 'to take or damage private property in the manner provided for by the law of eminent domain' is not granted in this docket."

The Order in Docket No. 07-0446 was appealed to the Illinois Appellate Court by some of the Intervenors in the case. The Order was upheld on appeal. *Pliura Intervenors v. Illinois Commerce Commission*, 405 Ill. App. 3d 199 (2010).

In Docket No. 13-0446, an Order was entered on April 29, 2014 pursuant to Section 8-509 of the PUA. It authorized Enbridge Pipelines (Illinois) L.L.C., "pursuant to Section 8-509 of the Act, to seek, in accordance with the Eminent Domain Act, easement rights along the pipeline that was certificated in Docket No. 07-0446 with respect to those parcels listed in Attachment A to the petition that [had] not yet been acquired." "Pliura Intervenors" filed an application for rehearing which was denied. Notice of appeal of the Order in Docket No. 13-0446 was filed on behalf of Pliura Intervenors. That appeal is pending.

Motion to Reopen and Amend Order

On May 19, 2014, Enbridge filed, pursuant to Section 10-113(a) of the Act, a "Motion to Reopen and Amend Order Concerning Diameter of the Southern Access Extension ['SAX'] Pipeline." Enbridge requests that the Certificate granted in the Order entered July 8, 2009 be amended to authorize a pipeline of "24 inches" rather than a "36-inch pipeline." Enbridge does not seek any change in the pipeline route or of right-of-way width.

In its Motion to Reopen and Amend Order, Enbridge stated that "the Southern Access Extension Pipeline" ("SAX" pipeline) certificated in the 2009 Order was conceived to utilize a 36-inch pipe to move mainly so-called "heavy" crude per anticipated supply patterns (Motion to Reopen at 2); that shipper interest in moving heavy crude to the Patoka Hub, manifested in 2006-2007, thereafter became uncertain due to economic conditions; and that Patoka became significant to shippers of light oil sought by refineries capable of processing it. (*Id.* at 5)

Applicant further asserted that Marathon Petroleum Company L.P. ("Marathon"), "which operates three PADD II refineries, including one in Robinson, Illinois, that are reachable via the Patoka Hub," has now committed to have Enbridge move light crude to Patoka via the SAX pipeline in order to supply these refineries; that Marathon has

contracted for enough of the line's initial capacity to warrant construction of the line; that other shipper interest in moving light oil to Patoka also has been made known to Enbridge; and that in addition, there continues to be the potential to move some volume of heavy crude to Patoka for further transport. (*Id.*)

Applicant also stated that "in the circumstances, and as part of the Light Oil Market Access Program, Enbridge Illinois has determined that the appropriate initial capacity of the SAX pipe line is now 300,000 bpd, a volume that can be readily accommodated by a 24-inch outside diameter pipeline." (*Id.* at 5-6)

Applicant also requested that the Motion to Reopen and Amend Order be decided without a hearing.

The Motion to Reopen and Amend Order was opposed by "Pliura Intervenors."

On June 26, 2014, the Commission reopened the proceeding "pursuant to Section 10-113(a) of the Public Utilities Act and 83 Ill. Adm. Code 200.900, for the limited purpose of allowing Parties to address whether the Order should be amended in the manner described in the Motion to Reopen and Amend Order...," as stated in a corrected notice of Commission action issued June 27, 2014, It is noted that 83 Ill. Adm. Code 200.900 is titled, "Reopening on Motion of the Commission." It provides in part that after issuance of an order by the Commission, the Commission may, on its own motion, reopen any proceeding..." (emphasis added)

As noted, Applicant requested that the Motion to Reopen and Amend Order be decided without a hearing. That request was not granted. The matter was set for hearing. Pliura Intervenors and Turner Intervenors oppose the relief sought by Applicant. Staff supports the amendment sought in Applicant's motion.

The positions of the Parties are described above. They will not be repeated in detail here.

Scope of Reopened Proceeding

As indicated above, the Parties disagree over the scope and purpose of the proceeding.

As explained in a ruling issued on September 3, 2014 which granted, in part, Pliura Intervenors" motion to compel, "[In] terms of the updated purpose and need, Applicant's Motion to Reopen is relying on the commitment from Marathon."

Furthermore, Applicant moved both its Motion to Reopen and its Reply on the Motion to Reopen into the evidentiary record.

As such, the issue of the current purpose and need for the line is found to be within the scope of the reopened proceeding and within the "limited purpose of allowing

Parties to address whether the Order should be amended in the manner described in the Enbridge Motion to Reopen."

A related "scope" issue raised by Pliura and Turner Intervenors is whether the purported need for the line is a "public need" within the meaning of Section 15-0401, or whether the line would instead be a "private pipeline" given Marathon's 35% ownership interest and the large amount of capacity committed to Marathon. Stated another way, Intervenors contend that Applicant would be operating the line as a contract carrier for the benefit of Marathon, rather than a common carrier. Again, the Commission finds that this issue is properly within the scope of the reopened proceeding. As indicated above, Applicant's Motion to Reopen and Amend the Order is relying on the commitment from Marathon. Therefore, Intervenors were entitled to address the issue and they were properly allowed to do so.

Public versus Private Need

As explained above, the 24-inch line would have a capacity of 300,000 bpd. There are shipping commitments from Marathon, which is the "anchor shipper," and a second shipper totaling 210,000 bpd. Intervenors note that only a very small percentage of the commitment is applicable to the second shipper. That percentage is identified in the record.

Pliura Intervenors argue, "The project has become a contracted carrier for a single large company, Marathon Petroleum Company and that single company has locked up the largest majority of its capacity for its own private refineries. As such, the proposed 24-inch project is now a private project for a single company, for which this project seeks eminent domain." (Pliura IB at 13)

Pliura Intervenors also argue, "[The] change in the project from a 36-inch line down to a 24-inch pipeline, and the investment interest purchased by Marathon Petroleum Company with its decision to lock-up 90% of the capacity of the line make it effectively a private line. The remaining available capacity is of de minimis value and certainly greatly discriminates against non-committed shippers as compared to Marathon Petroleum Company." (*Id.*)

Turner Intervenors argue, in part, "[The] proposed amendment is being requested for a private pipeline project where Marathon is the primary shipper and co-owner of 35% of IEPC. Since a private pipeline is not under the purview of the Common Carrier by Pipeline Law, the Motion of IEPC should be denied." (Turner draft order at 2)

In the current reopened proceeding, multiple Parties cite an "Order on Petition for Declaratory Order" in Docket No. OR13-19-000, issued by FERC on July 13 2013. 144 FERC 61,085. The FERC proceeding involves the same "SAX" line that is before the Illinois Commerce Commission in Docket 07-0446. The FERC order granted the

petition, which was filed by Enbridge Pipelines (Illinois) LLC. Several passages from that Order are set forth above.

Under "Commission Analysis," Paragraph 23 of the FERC Order provides, "The Commission will grant the Petition. The proposed terms of service and rate structure for committed and uncommitted shippers are permissible under the ICA and are consistent with applicable Commission policy and precedent regarding priority service terms and rates that can be offered to shippers that commit volumes through an open season to support a new infrastructure project." It continues, "Since its decision in *Express Pipeline P'ship*, the Commission has recognized that shippers making longer-term commitments incur costs and liabilities and undertake risks that make them not similarly situated with shippers that are unwilling or unable to do so."

Paragraph 24 provides, in part, "To minimize the risk that the Project will not move forward, and to provide financial assurance to Enbridge Illinois, the TSAs require shippers to commit to ship-or-pay contracts at premium rates for initial 10 or 15-year terms. In exchange for these commitments, Enbridge Illinois will reserve 90 percent of the capacity for those shippers and will assure such shippers that it will not prorate their committed volumes." It further provides, "Additionally, Enbridge Illinois will provide an appropriate amount of capacity (10 percent) for uncommitted shippers that do not provide the financial assurances that the committed shippers provide."

As noted above, Pliura Intervenors argue that "the change in the project from a 36-inch line down to a 24-inch pipeline, and the investment interest purchased by Marathon ... with its decision to lock-up 90% of the capacity of the line make it effectively a private line," and that the "remaining available capacity is of de minimis value and certainly greatly discriminates against non-committed shippers as compared to Marathon" Turner Intervenors make somewhat similar arguments.

The FERC order explained why committed shippers receive premium rates and priority service terms. As indicated by FERC, shippers making longer-term commitments "incur costs and liabilities and undertake risks that make them not similarly situated with shippers that are unwilling or unable to do so." While the Illinois Commerce Commission may not be bound by the FERC findings on the discrimination issue, the Commission believes that the FERC analysis and findings provide useful guidance. Given these considerations, the Illinois Commerce Commission does not agree with Pliura Intervenors' argument that offering such priorities to committed shippers "discriminates against non-committed shippers as compared to Marathon."

With respect to Pliura Intervenors' argument that "the investment interest purchased by Marathon with its decision to lock-up 90% of the capacity of the line make it effectively a private line," and that the remaining available capacity is of de minimis value, the Commission observes that there is not a commitment from Marathon entitling it to 90% of the capacity of the line. Marathon has committed to approximately two-thirds of the 300,000 bpd capacity of the line, not 90%; further, there is no indication that

Marathon's minority equity interest in the Applicant enables it to control the remaining capacity or to control the operation of the line.

Including the small commitment from another shipper, committed volumes are 210,000 bpd. The remaining capacity of 90,000 bpd is available to other shippers. The 90% proposal that FERC approved was for 90% of the capacity to be available for committed volumes and is not limited to Marathon. It would also apply to the other currently committed shipper, and any other shippers who make commitments in the future.

Given the importance and prevalence of committed shippers and volumes as explained and endorsed by FERC, it is difficult to see how relying primarily on committed shippers automatically means that a pipeline is operating as a private line rather than as a common carrier. To the extent Intervenors are arguing that all committed shipments are by definition private shipments, the Commission disagrees.

With respect to the 90,000 bpd that is available, it appears that the Applicant is actively seeking commitments from shippers other than Marathon through open seasons, while also reserving 10% of the total capacity for uncommitted volumes. That is, Applicant is holding itself out to provide service to additional shippers.

With regard to the amount of capacity available to shippers other than Marathon, the Commission does not believe the record supports a finding that the availability of approximately one-third of the capacity in a 300,000 bpd line to shippers other than Marathon is too small to be meaningful or too small to qualify as common carriage. In that regard, the Commission finds that as a condition on any approvals granted to Applicant on reopening, Applicant shall not decrease the amount of capacity on the line made available to shippers other that Marathon; and Applicant shall actively hold itself out to provide capacity to such shippers. As a related condition, the 35% minority equity interest held by Marathon or its affiliate shall not be increased.

With respect to public need, Mr. Maple testified on reopening, and the Commission agrees, that the SAX pipeline as currently planned will provide benefits to the public such as "a redundancy of pipeline network" and the ability to "bring in more sources of oil from friendly countries, be it Canada or the United States." (Tr. 1350-1351) The Commission observes that such benefits are similar to those relied upon in the Commission's conclusions in its 2009 Order in this docket. (2009 Order at 46-47)

The Commission also believes, as it did in the original Order, that consideration of these factors on the issue of public need is consistent with the Appellate Court's *Lakehead* decision. (*Id.* at 47, citing *Lakehead*, 296 III.App.3d 942, 955) There the Court stated, in part, that the "failure to provide a statutory definition of public need at any time strongly suggests that [the legislature] intended to allow the Commission to exercise a flexible approach toward these matters" and that "[i]n the context of public need, it is appropriate to look at the larger group of the general public to see if it requires the service...." *Lakehead* at 955.

In conclusion, the Commission finds that a public need for the 24-inch pipeline exists within the meaning of Section 15-401.

Docket No. 13-0446

As indicated above, Intervenors have made arguments regarding Docket 13-0446. Those arguments are summarized above and will not be repeated here.

For example, Turner Intervenors argue, in part, that "the decision in Case 13-0446 is void, since IEPC abandoned the project described in the original Certificate in Good Standing as early as 2009." (Turner draft order at page 2 of 2)

Applicant argues that the Intervenors' "collateral attack" on the Order in Docket 13-0446 should not be permitted in the current proceeding.

The Commission notes that an Order in Docket 13-0446 was entered on April 29, 2014. Rehearing was denied and the matter is now on appeal.

The Commission finds that its decision in Docket 13-0446 is not before the Commission in the current reopened proceeding in Docket 07-0446.

Accordingly, findings sought by Intervenors regarding the proceedings and Order in Docket 13-0446 will not be made in this Order. Likewise, the finding sought by Applicant regarding Docket 13-0446 will not be made in this Order. (App. draft order at 58)

Similarly, Pliura Intervenors' contested "amended motion to supplement the 07-0446 record by including the record from 13-0446" should be denied. The Commission also notes that Section 200.640 of the Commission's rules specifically discourages requests for administrative notice of transcripts, exhibits, pleadings and other matter of other docketed proceedings.

Ex Parte Communications

Turner Intervenors argue that "ex parte communication between IEPC and the ICC Staff prior to the filing of the Motion, commencing during the Case 13-0446 have corrupted the hearing process, thus justifying a decision denying the Motion." (Turner draft order at 2 of 2)

It is observed that in their initial brief and draft order, Turner Intervenors did not identify the ex parte documents to which they were referring. They did previously present five exhibits identified as Turner Intervenors' Ex Parte Exhibits 1 through 5, some of which are included in their reply brief.

Pliura Intervenors argue that the "net effect of these improper ex parte communications [between Applicant and Staff] is to taint the conclusions of the Staff with respect to the pending Motion," and that "under the circumstances of this troubling and extended series of improper ex parte communications, it is appropriate to severely discount the weight to be afforded the testimony of Mr. Maple and the arguments of Staff." (Pliura draft order at 20-21)

Pliura Intervenors argue that even if such communications were not prohibited, "the integrity and impartiality of the Staff's conclusions has been undermined." (Pliura IB at 4 and RB at 10) As noted above, in their briefs, Pliura Intervenors did not identify the ex parte documents to which they were referring.

With respect to ex parte restrictions, the Commission observes that Staff is not in the decisional process. Ex parte restrictions are not applicable to "communications between Commission employees who are engaged in investigatory, prosecutorial or advocacy functions and other parties to the proceeding...." 220 ILCS 5/10-103; see also 83 III. Adm. Code 200.710. Thus, if Staff is engaged in investigatory, prosecutorial or advocacy functions, it is permitted to engage in ex parte communication with other parties, including during pending cases. When such communications occur during a pending case, Staff files an ex parte report.

While Intervenors contend that Staff was not engaged in investigatory, prosecutorial or advocacy functions at the time of the communications, they do not explain the basis for such an argument. It appears that the communications regarding the change in the size of the pipe occurred prior to the filing of the Motion to Reopen. With respect to those communications, it appears that Staff was engaged in investigatory functions.

The Commission also finds that the arguments in Intervenors' briefs, and the number and nature of the examples of ex parte communications alluded to or included therein, do not support a finding that ex parte communications between Applicant and the ICC Staff have corrupted or tainted the hearing process, or compromised the integrity of the process. Accordingly, the motions to dismiss based on such arguments are denied. To the extent other parties question Staff's impartiality, they have the discretion to so argue and to further argue that the Staff recommendation should be given no weight; here, the Intervenors here have done so in their briefs. They were also given broad latitude in cross-examining the Staff witness in this regard.

Turner Intervenors also argue that under Section 200.25(a) of the Commission rules, the Staff has a "legal obligation" to provide a more complete analysis of the issues than it did, and that this analysis "must be completed before Section 200.25(a) has been complied with." The Commission observes, however, that generally speaking, Staff has the discretion to address whichever issues it elects to address, subject to motions and objections. If other parties do not believe the Staff's position is supported by the evidence and analysis provided by Staff, they can so argue, and the Intervenors here have done so in their briefs.

Intervenors also make arguments regarding Docket No. 13-0446. As indicated above, the Commission's decision in Docket 13-0446, which is on appeal, is not before the Commission in the current reopened proceeding in Docket 07-0446; and findings sought by Intervenors and Applicant regarding the proceedings and Order in Docket 13-0446 will not be made in this Order.

Other Issues

Pliura Intervenors argue that the Certificate has expired, based on Section 8-406(f) of the Act which states, in part, "Unless exercised within a period of 2 years from the grant thereof authority conferred by a certificate of convenience and necessity issued by the Commission shall be null and void."

In their replies, Applicant and Staff argue that Section 8-406(f) is not applicable to a Certificate issued under Section 15-401, and that Article XV does not contain a similar two-year expiration clause. Applicant also argues that the Order was appealed to the Appellate Court by Pliura Intervenors, and that Applicant it is not able to build the certificated line without easement rights from Pliura Intervenors and other landowners.

The Commission agrees with Applicant and Staff that Section 8-406(f) is not applicable to a Certificate issued under Section 15-401, and that Article XV does not contain a similar two-year expiration clause. Furthermore, it would be illogical to interpret Section 8-406(f) to require an applicant to undertake construction of a contested line within two years while the order granting the certificate is on appeal and easements are not provided absent eminent domain.

Conclusion

In conclusion, the Commission finds that a public need for the 24-inch pipeline exists within the meaning of Section 15-401. No changes in the other elements specified in the original certificate, such as pipeline route and easement width, are proposed or granted, and there is no indication a 24-inch line will impose more burdens on landowners than a 36-inch line. The Commission finds that the public convenience and necessity requires issuance of the certificate as amended to authorize a 24-inch line. The certificate granted in the Order entered July 8, 2009 should be amended accordingly.

X. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the record herein, finds that:

- (1) Applicant is a Delaware Limited Liability Company authorized to conduct business in the State of Illinois;
- (2) the Commission has jurisdiction over the parties and subject matter in this proceeding;

- (3) the findings of fact made and conclusions reached in the prefatory portion of this Order hereinabove are adopted as findings of this order;
- (4) for the reasons set forth in this Order above, the Order and Certificate in Good Standing issued in this Docket on July 8, 2009 shall be amended as ordered below.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Order entered on July 8, 2009 and the Certificate granted therein are hereby amended, and that as amended the Certificate shall read as follows:

CERTIFICATE IN GOOD STANDING

IT IS HEREBY CERTIFIED, subject to the conditions imposed in this Order and the Order entered July 8, 2009, that Illinois Extension Pipeline Company, L.L.C. is authorized, pursuant to Section 15-401 of the Common Carrier By Pipeline Law, to construct, operate and maintain the proposed 24-inch pipeline as described in this order and to operate as a common carrier by pipeline within an area sixty feet wide and extending approximately 170 miles along the route identified in Attachments A and B to the petition in Docket No. 07-0446.

IT IS FURTHER ORDERED that all requests to dismiss contained in motions to dismiss and other motions filed by Intervenors in the reopened proceeding are denied.

IT IS FURTHER ORDERED that Pliura Intervenors' amended motion to supplement the 07-0446 record by including the record from 13-0446 is denied.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 III. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED: November 21, 2014

Larry M. Jones Administrative Law Judge